No. ~~910~~ 252

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1922. 8

FIRST NATIONAL BANK IN ST. LOUIS,
Petitioner,

vs.

STATE OF MISSOURI ex inf. JESSE W. BARRETT,
Respondent.

BRIEF FOR DEFENDANT IN ERROR AND RESPONDENT IN CERTIORARI IN OPPOSITION TO APPLICATION FOR SUPERSEDEAS OR STAY OF PROCEEDINGS OR INJUNCTION.

JESSE W. BARRETT,
Attorney-General of Missouri.
MERRILL E. OTIS,
Assistant Attorney-General of Missouri.

SAM B. JEFFRIES,
WILLIAM T. JONES,
HAROLD R. SMALL,
MARION C. EARLY,
EDWARD W. FORISTEL,
Of Counsel.

St. Louis Law Printing Co., 415 N. Eighth St. Main 1819, Central 919.

INDEX.

Cases Cited.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1922.

FIRST NATIONAL BANK IN ST. LOUIS,
Petitioner,

vs.

STATE OF MISSOURI ex inf. JESSE W. BARRETT,
Respondent.

BRIEF FOR DEFENDANT IN ERROR AND RESPONDENT IN CERTIORARI IN OPPOSITION TO APPLICATION FOR SUPERSEDEAS OR STAY OF PROCEEDINGS OR INJUNCTION.

STATEMENT.

A few days prior to June 27, 1922, the First National Bank in St. Louis publicly announced its purpose to open a number of branch banks in the City of St. Louis and did establish a branch bank at 818 Olive street, St. Louis, Missouri, at which it has at all times since conducted and now is conducting a branch banking business, separate and apart from its banking house at the southwest corner of Broadway and Locust streets, St. Louis. Branch banking

by state banks being prohibited under the laws of the State of Missouri, and there being no authority under the acts of Congress for the establishment of branch banks by national banks, the Attorney-General of Missouri instituted in the Supreme Court of Missouri this suit against the First National Bank in St. Louis, the purpose of which was to compel this bank to cease operating its branch bank which it had only a few days before established, and to prevent it from opening other branch banks in the City of St. Louis, which it was preparing to do.

The petition filed June 27, 1922, by the Attorney-General of Missouri in the Supreme Court of that state is set forth at pp. 1 to 5, inclusive, of the transcript of the record filed herein.

After the filing of the above mentioned petition in the Supreme Court of Missouri, that tribunal issued an ancillary restraining order whereby it directed that "pending the final determination of this cause" the First National Bank, together with its officers, agents and servants, be restrained from establishing and operating branch banks in Missouri other than the branch bank already established by it, and from carrying on a banking business at any place excepting at its regular banking house, and excepting at the branch bank already established by it.

The Court further issued an order upon the First National Bank to show cause on or before the 28th

day of July, 1922, by what warrant, right or authority it had established the branch bank aforesaid, and by what warrant, right and authority it proposed to establish and conduct other branch banks in St. Louis.

The above restraining order and order to show cause are found on pp. 6, 7 and 8 of the transcript of record.

Thereafter, the First National Bank in St. Louis filed its motion to dissolve the ancillary order, its motion to quash and dismiss the alternative writ, and its demurrer to the information, which pleadings appear at pp. 9 to 13, inclusive, of the transcript.

Prior, however, to the filing of any of said motions, the bank filed its petition for removal of the cause to the District Court of the United States for the Central Division of the Western Judicial District of Missouri, but this petition was later withdrawn.

On the first day of November, 1922, the case was submitted to the Supreme Court of Missouri upon the pleadings aforesaid, upon briefs and after argument thereon by counsel for the respective parties, with the result that on March 3, 1923, judgment was rendered against said bank, as appears on pages 13 and 15 of the transcript of record.

From this judgment the First National Bank in St. Louis is perfecting an appeal to this Court, either by a writ of error or writ of certiorari.

The issuance of a writ of certiorari being a matter resting in the sound discretion of the Court, we here make a short presentation of the substantial facts.

The laws creating the present national banking system were enacted by Congress in 1864 and 1865. These acts as originally passed do not provide for the establishment of branch banks, nor has there since been enacted by Congress any law, by way of amendment or otherwise, giving national banks the right to establish branch banks.

The legislative construction upon our National Banking Act in this respect is shown clearly by the fact that the law as originally enacted authorizing state banks to be converted into national banks, could not be taken advantage of by those state banks having branch banks, and Congress later, recognizing this inability of state banks with branch banks to convert them into national banks, enacted Section 5154, U. S. R. S., which gives state banks possessing branch banks the right to be converted into national banks and to retain such branch banks, but does not allow such converted banks to establish further or other branch banks.

Again, when the Columbian Exposition was held at Chicago in 1893, Congress deemed it necessary to provide by special act for the establishment of a branch bank inside the fair grounds and within the corpo-

rate limits of the City of Chicago, and when the Louisiana Purchase Exposition was held at St. Louis in 1904, Congress again enacted a special law giving the right to establish a branch bank inside the exposition grounds and within the corporate limits of the City of St. Louis.

Many times during the history of our present banking system bills have been introduced in Congress to authorize the establishment of branch banks by national banks, but all such legislation has met with legislative disapproval, thus showing that Congress has not only construed the acts of Congress as granting no right to national banks to open and operate branch banks, but that Congress has withheld this right from them.

The construction placed upon the acts in question by Congress has been concurred in and followed by the executive department of the federal government. The Comptroller of the Currency is charged with the duty of enforcing our national banking laws, and the incumbent of this office has universally held, in his printed instructions regarding the organization and powers of national banks, that Section 5134, U. S. R. S. (U. S. Comp. Stat. 1916, Sec. 9659) provides in part that the organization certificate of a national bank shall show "the place where its operations of discount and deposit are to be carried on," and Section 5190, U. S. R. S. (U. S. Comp. Stat. 1916, Sec.

9744), that "the usual business of each national banking association shall be transacted at an office or banking house (not offices or banking houses) located in the place (not places) specified in its organization certificate." (Instructions of the Comptroller of the Currency relative to the organization and powers of National Banks, 1920, pp. 110, 111.)

The above has been the universal construction of the Comptroller of the Currency throughout the history of the present national banking system, and this construction has been approved by the Solicitor of the Treasury of the United States in an opinion rendered August 10, 1899, on the question of the right of a national bank to establish and maintain a cash room at some point distant from its banking house, for the purpose of receiving deposits and paying checks.

In conformity with the above construction of the federal statutes authorizing national banks, no state bank has been permitted to operate branch banks in the State of Missouri since the adoption of the federal statute creating the present national banking system. Since 1865 Missouri has adhered to the policy adopted by the federal government. In conformity with the accepted construction of the federal statute as applicable to branch banks, the State of Missouri, through its Legislature, enacted laws providing that

no bank shall maintain in this state a branch bank (Section 11737, R. S. Mo. 1919, Subdiv. 1).

The fact that the First National Bank in St. Louis opened up its one branch and was preparing to establish others necessarily created great apprehension upon the part of the banking interests of Missouri, and of the City of St. Louis in particular. State institutions which were denied the right by positive law realized their helpless position, and more particularly was this true when other national banks in St. Louis, Missouri, began to seek locations for the establishment of branch banks.

Believing that the congressional and executive construction of our federal banking statutes was the correct construction, knowing that the law was being violated, and realizing that Missouri, by positive laws, prohibited the business of branch banking in conformity with what was the general and accepted construction of federal laws, and after being advised that the Comptroller of the Currency had been notified of the conduct of the First National Bank in St. Louis and requested to intercede on behalf of the general banking interests of the State of Missouri and had declined to do so, the Attorney-General of Missouri deemed it advisable and absolutely essential that suit be instituted to cause the cessation of such unlawful acts of the First National Bank.

The result of the proceeding for quo warranto was that the Supreme Court of Missouri, on March 3rd,

1923, ordered that the bank "be ousted from the privilege of operating its said branch bank located at No. 818 Olive street, in the City of St. Louis, Missouri, or any other branch bank, and from conducting a banking business thereat as prayed in the said information in the nature of quo warranto."

The bank has now, by writ of error and certiorari, sought to have the case appealed to this court. The bank has filed an application for supersedeas or stay of proceedings or injunction in this court and has also filed its motion, as plaintiff in error and as petitioner in certiorari, to advance this case upon the docket of this court. The bank has served notice on the State of Missouri that on Monday, April 9th, 1923, it will present to this court a petition for writ of certiorari, and we assume that it is the purpose of the bank to present at the same time its application, copy of which has been served, which application is for supersedeas or stay of proceedings or injunction.

Referring to the First National Bank's motion to advance this case on the docket, the State of Missouri has no objection to an early setting of the case, provided the Court assumes jurisdiction by writ of error or certiorari.

The main question to which the State of Missouri desires to address itself in this matter is the question of whether any supersedeas or stay or injunction shall issue and, if so, to what extent.

POINT.

No supersedeas or stay order or injunction should be granted in this case that will permit the First National Bank, plaintiff in error, to open or operate, pending this appeal, any branch banks in St. Louis in addition to the one at 818 Olive street, which it is now operating.

This branch bank was being operated, and was the only one being operated, at the date of the institution of this suit and it is the only one now in operation.

ARGUMENT.

While the equities of the situation may justify the granting of a supersedeas that will allow the bank to continue in operation the one branch bank which it was operating at the commencement of this quo warranto proceeding in the Supreme Court of Missouri, no principle of equity or justice warrants the granting of a supersedeas that will permit the bank to extend its branch bank operations beyond what they were at the time of the commencement of this suit; that is to say, beyond the operation of the one branch bank that it was operating at that time and is still operating.

The bank's petition in this connection seeks to have the judgment of the Supreme Court of Missouri in this case entirely vacated pending this appeal, so the bank may be permitted to open up and operate as many branch banks in the City of St. Louis as it desires. The State of Missouri respectfully submits that the supersedeas, if granted, should be so limited that the status quo will be maintained pending final determination of the cause by this Court, as it was at the institution of this suit in the Supreme Court of Missouri.

The petition of the First National Bank for a supersedeas or injunction that will entirely nullify the

decree of the Supreme Court of Missouri and permit the bank to open and operate additional branch banks while this appeal is pending, should be denied, for the following reasons:

1. The operation of branch banks is not permitted by the National Banking Laws. Section 5190, U. S. R. S. provides:

> "The usual business of each national banking association shall be transacted at **an** office or banking house located in the place specified in its organization certificate."

Pratt's Digest of Federal Banking Laws, a recognized authority on national banks, 1920 edition, page 100, says:

> "It is settled beyond doubt that a national bank, independently of the National Bank Act, is not, under its charter, authorized to establish a branch bank for the purpose of carrying on a general banking business in the place designated in its certificate of organization, or anywhere in the United States; and, furthermore, that Section 5190, U S. R. S., properly construed, restricts the carrying on of a general banking business by a national bank to **one** office or banking house in the place designated in the association's certificate of organization, except in so far as that section is amended by Section 25 of the Federal Reserve Act, which permits foreign branches under certain conditions."

This question was exhaustively discussed in the opinion of Attorney-General Wickersham, dated May 11th, 1911, and appearing in Volume XXIX, Opinions of Attorney-General, pp. 81 to 98, and, without attempting to enter upon a discussion of the question here, we beg to refer to that opinion, which concludes as follows:

> "First. Independently of Section 5190, R. S., a national bank is not, under its charter, authorized to establish a branch or co-ordinate office for the purpose of carrying on a general banking business in the place designated in its certificate of organization; and
>
> "Second. That Section 5190, R. S., properly construed, restricts the carrying on of the general banking business of a national bank to one office or banking house in the place designated in the association's certificate of organization."

This question has never been directly passed upon by this Court, but the universally recognized and accepted construction of the law, as set out above, was recognized by this Court in the First National Bank v. Hawkins, 174 U. S. 364, wherein the Court said:

> "Another evil that might result, if large and wealthy banks were permitted to buy and hold the capital stock of other banks, would be that, in that way, the banking capital of a community might be concentrated in one concern, and busi-

ness men deprived of the advantages that attend competition between banks. Such accumulation of capital would be in disregard of the policy of the national banking laws, as seen in its numerous provisions regulating the amount of the capital stock and the methods to be pursued in increasing or reducing it. The smaller banks, in such a case, would be in fact, though not in form, branches of the larger ones."

The construction of the National Banking Act in this connection, as above stated, appears never to have been seriously questioned since the adoption of the act in 1864, until the First National Bank of St. Louis started on its career of branch banking in 1922.

2. The operation of branch banks is expressly prohibited by the laws of Missouri. Section 11737 R. S. Mo. 1919, provides:

> "Every such corporation (referring to banking corporations) shall be authorized and empowered: 1. To conduct the business of receiving money on deposit and allowing interest thereon, and of buying and selling exchange, etc. * * *. Provided, however, that no bank shall maintain in this state a branch bank or receive deposits or pay checks except in its own banking house."

Section 11684, R. S. Mo. 1919, provides:

> "No corporation, domestic or **foreign,** other than a corporation formed under or subject to the banking laws **of this state, or of the United States, except as permitted by such laws**, shall by any implication or construction be deemed to possess the power of carrying on the business of discounting bills, notes or other evidences of debt, or of issuing bills, notes or other evidences of debt, etc. * * *."

Under these provisions, a national bank, in conducting branch banks in the State of Missouri, is violating the laws of both the nation and the State of Missouri.

Unless it is authorized to conduct branch banks by the National Banking Laws, for if branch banks are not permitted by the National Banking Laws, national banks cannot claim the protection of these laws when charged with the violation of the provisions of the state statutes above quoted.

(3) Either the United States or Missouri, or both, have the power to stop the doing in Missouri of any act by a national corporation that is in excess of the national corporation's power to do, and is at the same time an act that is violative of the policy and positive law of Missouri.

> First National Bank v. Commonwealth, 143 Ky. 816, 34 L. R. A. (n. s.) 54;

Hale v. Henkle, 201 U. S. 43;
Halter v. Nebraska, 205 U. S. 34;
Gilbert v. Minnesota, 254 U. S. 325, 329, 332.

A mere individual may stop a state officer from doing an act, under a state law, that is unconstitutional.

Exparte Young, 209 U. S. 123.

Individuals may stop an act being done by a Federal official under a Federal law that is unconstitutional.

Wilson v. New, 243 U. S. 332;
Hammer v. Dagenheart, 247 U. S. 251;
Kennington v. A. Mitchel Palmer, 255 U. S. 100.

A state may stop an act being done by a federal official under an unconstitutional federal law.

State of Missouri v. Holland, U. S. Game Warden 252 U. S. 416.

If a state may stop an act of a federal official being done under an unconstitutional federal law, it follows that a state may stop an act being done by a national corporation that is not done under any federal law, but is done without federal power or authority to do it, when such act is in addition also

an outlaw act against the policy and positive law of the state. In short, the shield of the national charter will not permit a national corporation to run amuck in a state in defiance of all law and all authority, and the state in the just and proper exercise of its police power has a right to stop excesses even of a national corporation, when particularly the stopping of such excess is in thorough accord with the policy, aims and purposes of the national government.

> First National Bank v. Commonwealth, 143 Ky. 816;
> Gilbert v. Minnesota, 254 U. S. 325, 329, 332.

Missouri has the right to sue a national bank in its own courts.

> Herman v. Edwards, 238 U. S. 107.

A state has the right to stop an act being done in the state by a foreign corporation when such act is in violation of the law of the state.

> Standard Oil Company v. Missouri, 224 U. S. 270.

4. The First National Bank, when it began its branch banking operations in St. Louis, knew of the long established, accepted and uniform construction of the National Banking Laws as above set out, and knew that no other national bank in the United States

had established and maintained branch banks, excepting under special acts of Congress granting such power under clearly specified conditions, and further knew that in taking such action, it was doing so without any authorization by the Comptroller of the Currency therefor. It, therefore, knew the hazard it was taking in embarking upon such a career, and cannot complain of the predicament it finds itself in at this time.

5. The highest court of the state of Missouri has, after full consideration, determined that the operation of a branch bank by the First National Bank was without federal authority and in violation of the laws of the State of Missouri. To grant a supersedeas of the scope and effect sought by the bank, pending this appeal, would enable it to commit further and additional acts of violation of the laws of the Nation and the State of Missouri. Its effect would be to nullify this Missouri Supreme Court decree completely, pending this appeal.

6. The effect of allowing the First National Bank to open and operate additional branch banks in St. Louis would make it necessary for other national banks to do or attempt to do likewise as a matter of protection against that bank's competition. If this is done, one of two results is bound to follow, either

the Attorney-General of Missouri, as a matter of consistent practice, will be required to proceed against such other banks in like proceedings as this, or, if such actions are not taken, the banking business of the City of St. Louis will be, seriously disturbed and demoralized. Furthermore, if the latter course is permitted, inherent and manifest injustice will result to the state banks of Missouri, and particularly of St. Louis, they being expressly prohibited from operating branch banks.

7. The act of the First National Bank complained of, being violative of both the federal and state laws, is, therefore, one that both the nation and the state, or either, may take necessary action to prevent. This proceeding by the State of Missouri should, therefore, be regarded, as in truth it is, a proceeding not only on behalf of the State of Missouri, but also in behalf of the United States, and as an aid and protection of the sovereignty of both the nation and the state.

8. The damage that will result to the State of Missouri and to its citizens, including other banking institutions, state and national, located within the state, are such that they will be incapable of pecuniary admeasurement, and hence no supersedeas bond that may be given by the First National Bank herein, however large, will afford protection to the State of

Missouri and its citizens in the event the judgment and decree of the Supreme Court of Missouri is affirmed by this Honorable Court. Furthermore, there would be no adequate remedy available to the general public, in whose interest this suit was instituted.

9. The injury to and the damage that would be suffered by the First National Bank in continuing the status quo until the determination of this cause in this court, if the decree should be set aside, would be inconsequential as compared to the injury and damage to the State of Missouri and the citizens thereof if the protection of the decree and the injunctive order in this case is removed, and the bank is permitted to proceed at once with its plan of establishing additional branch banks throughout the City of St. Louis.

10. The evident purpose of the First National Bank is to establish its branch banks before a final decree can be secured herein prohibiting it from doing so, in the expectation that, by congressional legislation, or otherwise, it will be permitted to maintain and operate these banks, even though a decree adverse to it be rendered in this case, thereby securing a great advantage over other banks operating in St. Louis.

11. This proceeding was instituted by the legal

representative of the State of Missouri, in the name of the state, and for the protection of the public interest, and as against this the First National Bank can set up only its private interests. As between a public interest and private interest the former should receive first consideration.

12. The courts are always disposed not to disturb the status quo pending final determination of the cause. For this reason the rule is well established in equity that supersedeas will not of and by its own force operate to set aside a prohibitive injunction, but will a mandatory injunction. The former preserves the status quo, while the latter would change it. The same distinction applies generally as between self-executing and non-self-executing judgments and decrees.

On this point it is said in a comprehensive note in **38 L. R. A. (n. s.) 436,** to the case of **Hulbert v. California Portland Cement Co., 118 Pac. 928:**

> "As ordinarily the perfecting of an appeal from a judgment, decree or order stays only affirmative proceedings thereunder, an appeal from a judgment, decree or order granting an injunction, while it suspends the effect of the injunction **if it be mandatory,** requiring or permitting positive action, does not suspend the opera-

tion of the injunction if it be merely prohibitory so that it is self-executing, requires no affirmatime action and merely maintains the status quo pending the appeal. As said in Fort Worth Driving Club v. Fort Worth Fair Assn., 56 Texas Civ. App. 162: 'The great weight of authority supports the proposition that it is only where the preliminary order is mandatory (that is, requires affirmative action, performance of specified things) that an appeal with supersedeas suspends the order. In cases, however, where, as here, the order is prohibitive merely, the appeal leaves it operative—the principle of the rule being the same in both cases, viz., to preserve the status quo of the parties and subject matter pending the appeal, leaving them as nearly as possible in the condition the court finds them at the time the appeal is perfected, thus preventing affirmative action either in accord with or violative of the terms of the order.' So, if the injunction is mandatory in effect, the appeal stays proceedings; if merely prohibitory, matters are to remain in statu quo and there are no proceedings to be taken under it. No affirmative acts are necessary to execute it which could be stayed by the appeal (Maloney v. King, 26 Mont. 487)."

Numerous other cases are cited in this note in support of this proposition.

13. We quote from a few cases as illustrative of the

disposition of the Courts in exercising their discretion granting writs of supersedeas as follows:

In the case of **Barnes v. Chicago Typographical Union, 232 Ill. 402,** the Court said:

> "To adopt a rule that the court granting an injunction must stand idly by and see it violated while an appeal is pending, and after the case is reinstated in that court may then proceed to punish would be attended with evil consequences. All that it would be necessary for a defendant to do to secure immunity until the case should be reinstated in the court would be to pray an appeal and file a bond. * * * No reason is apparent to us why the superior court should be refused its right to maintain its authority as a matter not affected in any way by the appeal and which is not dependent in any respect upon the final outcome of the suit until the decree has been affirmed by the appellate court, since the question whether the decree was erroneous or not is in no way involved in maintaining the existing status. If the court should be denied the right to compel obedience to the prohibition of the decree until the original case has completed its rounds through the courts, appellees might lose all benefits of their litigation and have their business ruined although the decree should finally be affirmed. We are not prepared to adopt such a doctrine."

In the case of **Jacoby v. Shomaker, 26 Fla. 502,** it was held that while the Appellate Court upon proper security being given for the indemnity of the appellee against resulting loss or damage will grant a supersedeas of the injunction in any case where the damage to result from the supersedeas is of a character that can be compensated in money and the appeal is not frivolous, it will not, unless the error of the injunction decree is palpable, grant a supersedeas in a case of such nature that, if the decree granting the injunction is ultimately affirmed, the appellee's injury cannot be compensated in money or otherwise, while if the decree is ultimately reversed, the damage which will result to the appellant from the injunction is clearly one of a pecuniary character—such as in a case of a suit virtually in behalf of the public or the people of a certain district to enjoin the establishment or continuance of a retail liquor business.

In **Corpus Juris, Vol. 3, page 1279, Sec. 1403,** it is said:

> "In some states the general rule that self-executing judgments are not within the statute providing for a supersedeas or stay is applied to judgments of removal or ouster from office, as in quo warranto and similar proceedings and judgments in election contests. And it is held that as no process is necessary to place a successful

> **relator in possession of an office, an appeal or writ of error will not operate as a supersedeas to prevent him from exercising the functions of the office and the filing of a supersedeas bond will not suspend the operation of the judgment.''**

In the case of **State ex rel. v. Woodson, 128 Mo. 497, l. c. 518,** it is said:

> "When a judgment is self-enforcing a supersedeas does not alter the state of things created by the judgment from which the appeal is prosecuted'' (citing Elliott on Appellate Procedure, Sec. 392, and cases cited).

The Attorney-General of Missouri feels that he may not be justified in insisting, if certiorari is granted, that the decree of the Supreme Court of Missouri should be enforced as to the one branch bank at 818 Olive street while this appeal is pending, and he therefore consents, if this Court shall deem it proper, that an order or supersedeas be granted staying, pending this appeal, the execution of that part of said decree by which the First National Bank is required to discontinue the operation of this one branch bank.

But the Attorney-General of Missouri objects to the granting of a supersedeas or stay or injunction in connection with this appeal that will permit the

First National Bank to open and operate any additional branch banks.

Respectfully submitted,

Jesse W. Barrett
....
Attorney-General of the State of Missouri.

Merrill E. Otis
....
Assistant Attorney-General of the State of Missouri.

Sam B. Jeffries
....
William T. Jones
....
Horace R. Lowell
....
Marion C. Early
....
Edward W. Foristel
....
Of Counsel.

April, 1923.

Service of copy of the foregoing brief is acknowledged this........day of April, 1923.

....
Of Counsel for Petitioner.

[illegible]

[illegible]

FIRST NATIONAL BANK IN ST. LOUIS,
Plaintiff in Error,

vs.

STATE OF MISSOURI at inf. JESSE W. BARRETT, Attorney-General,
Defendant in Error.

[illegible]

BRIEF AND ARGUMENT FOR DEFENDANT IN ERROR.

JESSE W. BARRETT,
Attorney-General of Missouri,

[illegible]
[illegible] Attorney-General of Missouri,
for Defendant in Error [illegible]
[illegible].

SAM B. JEFFRIES,
WILLIAM T. [illegible],
[illegible],
MARION C. EARLY,
EDWARD W. [illegible],
Of Counsel.

[illegible]

INDEX.

Authorities Cited.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1922.

FIRST NATIONAL BANK IN ST. LOUIS, Plaintiff in Error, vs. STATE OF MISSOURI ex inf. JESSE W. BARRETT, Attorney-General, Defendant in Error.	No. 919.

BRIEF AND ARGUMENT FOR DEFENDANT IN ERROR.

STATEMENT.

On June 15th, 1922, the First National Bank in St. Louis, plaintiff in error here, established in the City of St. Louis at a location other than that of its regular banking house a branch bank "for conducting a general banking business." At the same time it announced that it would shortly open from twelve to fifteen other like branch banks at various locations in the City of St. Louis.

This action of the plaintiff in error was taken in direct disregard of the last official pronouncement on this subject by the Attorney-General of the United

States, under date of May 11th, 1911 (see opinion of Attorney-General Wickersham set out in full in Appendix A hereof), in which it had been ruled:

> **"First. Independently of Section 5190, Revised Statutes, a national bank is not, under its charter, authorized to establish a branch or coordinate office for the purpose of carrying on a general banking business in the place designated in its certificate of organization; and,**
>
> **"Second. That Section 5190, Revised Statutes, properly construed, restricts the carrying on of the general banking business by a national bank to one office or banking house in the place designated in the association's certificate of organization."**

It was taken in direct disregard of the published and then effective instructions of the Comptroller of the Currency prohibiting the establishment by national banks of branch banks, being Instructions of the Comptroller of the Currency Relative to the Organization and Powers of National Banks, for the year 1920, which instructions are set out in full in Appendix B hereof.

On August 15, 1922, the Comptroller of the Currency issued a public statement to the effect that he had in no case authorized a national bank to establish branch banks in those states wherein state banks were not permitted under state laws the same privilege.

At the time of the aforesaid action on the part of the plaintiff in error, the laws of Missouri provided that:

> "No bank shall maintain in this state a branch bank, or receive deposits, or pay checks except in its own banking house" (R. S. Mo. 1919, Sec. 11737).

Under these circumstances, the Comptroller of the Currency having been requested to prevent the unlawful action of the plaintiff in error as aforesaid, and having declined so to do, the Attorney-General of Missouri, on June 27th, 1922, filed in the Supreme Court of Missouri an information in the nature of quo warranto (Tr. of Rec., p. 1), wherein he charged that plaintiff in error, having been incorporated to conduct a general banking business in the City of St. Louis, Missouri, and having theretofore selected a location for conducting its business, which for several years it had occupied and used as its banking house, had illegally opened a branch bank "for conducting a general banking business" at a different location "in a separate building located several blocks from the banking house before mentioned, which said branch bank it is now conducting and proposes to continue to conduct and where it is engaged in the business of banking, discounting bills, notes and other evidences of debt, receiving deposits

and paying out the same upon check, buying and selling bills of exchange and lending money." It was further charged that the plaintiff in error was arranging and proposed "shortly to open other branch banks, some twelve or fifteen in number, at various points or locations in the City of St. Louis." The information prayed that the plaintiff in error be ousted from the privilege of operating the branch bank already established or any other branch banks and from conducting a banking business at any place or location other than one banking house or office maintained by it for such purposes.

On September 8th, 1922, plaintiff in error filed its motion to quash (Tr. of Rec., p. 6) and dismiss the alternative writ theretofore issued, to wit, on June 28th, 1922 (Tr. of Rec., p. 4), requiring plaintiff in error to show cause on or before July 28th, 1922, why it should not be ousted from the privilege of operating branch banks.

At no time did plaintiff in error comply with the order to show cause, but on October 24th, 1922, plaintiff in error filed its demurrer (Tr. of Rec., p. 6).

On March 3rd, 1923, the Supreme Court of Missouri delivered its opinion (Tr. of Rec., p. 8), and pronounced judgment (Tr. of Rec., p. 7), ousting plaintiff in error of the power and privilege of possessing and operating branch banks.

Thereafter, plaintiff in error sued out its writ of error to this Court.

Supersedeas has been granted to permit the Bank to continue to operate its branch bank at 818 Olive street, pending the determination of this case.

The case has been advanced for hearing to April 30, 1923.

The question is, whether the branch banking of a national bank is unauthorized and illegal under national and Missouri law, and if so, whether Missouri by quo warranto in its own courts can suppress the usurpation.

For more ready understanding, the question may profitably be divided into the following four:

First. Is branch banking authorized (by implication, as the bank claims) by the National Bank Act?

Second. If branch banking is not authorized, but is prohibited by the National Bank Act, can such branch banking by the bank, if also violative of Missouri statutes governing banks, be stopped by Missouri?

If the answer to the first question is in the negative, that branch banking is unauthorized, and to the second question is in the affirmative, that Missouri may stop branch banking, two minor questions remain:

Third. Can Missouri by quo warranto stop the unauthorized, illegal operations in Missouri of a national corporation as Missouri can stop the unauthorized, illegal operations in Missouri of a foreign corporation?

Fourth. May Missouri employ her own courts to stop respondent?

BRIEF OF ARGUMENT.

I.

Branch Banking Unauthorized and Prohibited by Nation and State.

It is unlawful for a national bank to establish or operate a "branch bank" whereat it conducts "a general banking business" and engages "in the business of banking by discounting bills, notes and other evidences of debt, receiving deposits and paying out the same upon check, buying and selling bills of exchange and lending money." (Quotations from the Information, Tr., p. 1).

1. The United States statutes relative to national banks constitute the measure of the authority of such corporations, and they cannot rightfully exercise any powers except those expressly granted, or which are incidental to carrying on the business for which they are established ("such incidental powers as shall be necessary to carry on the business of banking" [quotations from the Statute, Sec. 5136, U. S. R. S.]).

> California National Bank v. Kennedy, 167 U. S. 362, l. c. 366;
> Logan County National Bank v. Townsend, 139 U. S. 67, l. c. 73;
> 7 Corpus Juris 807.

2. No express authority is conferred by the United States statutes upon national banks to establish or operate branch banks.

> U. S. R. S., Sec. 5134 (U. S. Comp. Stat. 1916, Sec. 9659);
> U. S. R. S., Sec. 5136 (U. S. Comp. Stat. 1916, Sec. 9661);
> U. S. R. S., Sec. 5155 (U. S. Comp. Stat. 1916, Sec. 9695);
> Act of Congress, May 1, 1886, c. 73, Sec. 2, 24 Stat. 18 (U. S. Comp. Stat. 1916, Sec. 9662);
> U. S. R. S., Sec. 5190 (U. S. Comp. Stat. 1916, Sec. 9744);
> Act of Congress, Dec. 23, 1913, c. 6, Sec. 25, as amended, Act of Congress Sept. 7, 1916, c. 461 (U. S. Comp. Stat. 1916, Sec. 9745).

3. The power to operate branch banks is not one of "such incidental powers as shall be necessary to carry on the business of banking."

> Opinion of Attorney General Wickersham in the matter of the Lowry National Bank of Atlanta, Ga., Vol. 29, Opinions Attorney-General 81;
> Opinions of Solicitors of the Treasury, under dates of August 10th, 1889, and November 15, 1910, cited in the Attorney-General's Opinion, supra, page 97;
> State of Missouri ex inf. v. First National Bank (the present case), Transcript of Record, p. 8;
> Bruner v. Citizens Bank, 134 Kentucky 283;

Morehead Banking Co. v. Tate, 122 N. Car. 313;

Magee on Banks and Banking, 2nd Edition, 1913, pp. 42-45;

Pratt's Digest of Federal Banking Laws, 1920 Edition, p. 100, and 1922 Supplement thereto, p. 7;

Morse on Banks and Banking, Sec. 46;

1 Morawetz on Corporations, Sec. 387;

Zane on Banks and Banking, Sec. 24.

4. Not only has a national bank no express or implied authority to establish or operate a branch bank, but it is expressly restricted by the statute (U. S. R. S. 5190) to "an office or banking house."

A. This statute restricts a national bank to one or a single banking house.

Opinion of Attorney-General Wickersham, 29 Opinions Attorney-General 81, l. c. 92, 98;

Opinion of Solicitor of the Treasury Hepburn, quoted in Magee on Banks and Banking, 2nd Edition, p. 44;

Armstrong v. National Bank, 38 Fed. Rep. 883;

State ex inf. v. First National Bank (the present case), Transcript of the Record, p. 8;

Pratt's Digest of Federal Banking Laws, 1920 Edition, p. 100, and 1922 Supplement thereto, p. 7;

Instructions of the Comptroller of the Currency, 1920, p. 110.

B. The ordinary meaning of the word "an" is **one.**

Funk and Wagnall's New Standard Dictionary;
Webster's New International Dictionary;
Black's Law Dictionary, 2nd Ed., p. 67;
2 Corpus Juris, p. 332;
Hastings v. Brown, 1 El. & Bl. 451, l. c. 454; 118 Eng. Rep. Full Reprint, 505, l. c. 506;
Moyahan v. City of New York, 205 N. Y. 181;
People v. Ogden, 8 Appellate Div. 464, l. c. 467, 40 N. Y. Supplement 827;
Wastl v. Montana Union Ry. Co., 61 Pac. 9, l. c. 15;
Wades v. Figgatt et al., 75 Va. 575, l. c. 582.

C. Not only does the word "an," as used in this statute, denote the singular, but so also do the words "office" and "banking house" and "usual business." Nothing in the statute suggests plurality.

5. At the time of the adoption of the present National Bank Act (1864), branch banking was well known. Branch banks had been expressly permitted under the first United States Bank Act and under the second National Bank Act. Moreover, at the time of the adoption of the present (or third) National Bank Act, branch banks were permitted under express statutory authority in a number of states. It is a matter of history that the subject of branch banking and of its corollary, the centralization of banking power, was a subject of bitter controversy.

Under such circumstances it is inconceivable that Congress intended that branch banking should be permitted under the National Bank Act as one of the incidental powers of a national bank, of too little importance to be specifically set out and without any provision whatever regulating branch banks, their number, location, etc., the amount of capital to be prorated to each, or the method and manner of conducting them. Under such circumstances, the failure expressly to grant the power to establish branch banks must be construed as an implied prohibition of such power.

> Opinion of Attorney-General Wickersham, 29 Opinions Attorney-General 81, l. c. 94;
> California Bank v. Kennedy, 167 U. S. 362, l. c. 366;
> First National Bank v. National Exchange Bank, 92 U. S. 122, l. c. 127.

6. Congress has consistently construed the United States statutes as denying to national banks the right to establish and operate branch banks, and has accordingly enacted special enabling acts when in particular instances it has desired to permit national banks to operate branch banks.

> Section 5155, R. S. U. S., enabling state banks having branches to retain branches upon conversion to national banks;

Act of Congress, May 12, 1892, authorizing a branch bank at the Chicago Exposition;

Act of Congress, March 3, 1901, authorizing a branch bank at the Louisiana Purchase Exposition.

7. Not only has Congress construed the United States statutes as prohibiting branch banks, but the same construction has been placed upon them throughout by the Treasury Department and the Comptroller of the Currency.

Opinion of Attorney-General Wickersham, 29 Opinions Attorney-General 81, l. c. 97;

Opinions of Solicitors of the Treasury, under dates of August 10, 1889, and November 15, 1910, cited in the Attorney-General's Opinion, supra, p. 97;

Instructions of the Comptroller of the Currency, 1920, p. 110;

Instructions of the Comptroller of the Currency (1909), cited in the Attorney-General's Opinion, supra, p. 97;

Pratt's Digest of Federal Banking Laws, 1920 Ed., page 100; and 1922 supplement thereto, p. 7;

Ruling of Comptroller of the Currency that national banks have no right to establish or operate branch banks in Missouri, see page 46 hereof, and 1922 supplement to Pratt's 1920 Digest of Federal Banking Laws, p. 7.

8. Courts recognize the construction placed upon statutes by officers whose duty it is to execute them, especially when such construction has been made by the highest officers in the executive department of the government and has been followed for many years; when, too, such construction is reasonable and of great persuasive force. Similarly, the construction of a statute by the legislature, as indicated by the language of subsequent enactments, is entitled to great weight.

Executive Construction.

36 Cyc 1140;
U. S. v. Cerecedo etc. Compania, 209 U. S. 338;
U. S. v. Finnell, 185 U. S. 236, l. c. 244.

Legislative Construction.

36 Cyc 1142;
U. S. v. Freeman, 3 Howard 556, l. c. 565.

9. The course of conduct of national banks relative to branches, the attitude of Congress relative thereto, and the rulings and attitude of the United States Treasury Department have fixed a positive policy of limitation against branch banks in the United States since 1864. This Court has recognized that policy.

First National Bank v. Hawkins, 174 U. S. 364, l. c. 369.

10. The State of Missouri has conformed its public policy with respect to branch banking to the declared public policy of the Federal Government and has prohibited state banks from the establishment or operation of branch banks. Similarly, a great many of the states have prohibited the establishment of branches by state banking institutions. (Where branches are permitted in the state it is always by express authorization.)

Section 11737, R. S. Mo., 1919.

11. To permit national banks to establish and operate branch banks in those states in which state banks are prohibited from the exercise of a like privilege is to destroy state banks in such states. This Court will not adopt a construction of the law producing such results, if a construction conforming to the hitherto-declared public policy of the federal government and the states is reasonably possible. If a change in the public policy of the government is demanded by changed conditions, it can be effected by Congress in an act excepting from its operation those states where state banks are prohibited from having branch banks.

II.

THE RIGHT AND DUTY OF MISSOURI TO SUPPRESS THE USURPATION.

Branch banking by a national bank is an act of usurpation outside the ambit of its power and authority to rightfully engage in, is non-national bank in character, and a national bank is not acting as such nor was an agency or creature of the federal government when it engages in branch banking.

The attitude of both sovereignties with respect to branch banking being the same, and the act of usurpation of the First National Bank in engaging in unauthorized branch banking in Missouri being non-national bank in character, either sovereignty may properly put a stop to the usurpation.

And particularly may Missouri so act when the ultimate decision rests on appeal, as here, with the Supreme Court of the United States.

McClellan v. Chipman, 164 U. S. 356, 359;
First National Bank v. Fellows, 244 U. S. 416;
American Bank v. Federal Reserve Bank, 256 U. S. 350;
First National Bank v. Commonwealth of Ky., 143 Ky. 816, 34 L. R. A. (n. s.) 54;
Osborne v. United States Bank, 9 Wheat 737;
Ex parte Young, 209 U. S. 123;
Wilson v. New, 243 U. S. 332;

Hammer v. Dagenhart, 247 U. S. 251;
Griesedieck Bros. Brewery Co. v. Moore, Internal Revenue Collector, 262 Fed. 582;
Kennington v. Palmer, Attorney-General of the United States, 255 U. S. 100;
Missouri v. U. S. Game Warden, 252 U. S. 416;
Guthrie v. Harkness, 199 U. S. 148, 159;
Gilbert v. Minnesota, 254 U. S. 325, 329, 332;
Halter v. Nebraska, 205 U. S. 34;
Hale v. Henkel, 201 U. S. 43, 75.

Quo warranto is the form of remedial writ.

First Nat. Bank v. Fellows, 244 U. S. 416;
Standard Oil Co. v. Missouri, 224 U. S. 270;
Opinion of Missouri Supreme Court in the case at bar, Appendix C hereto.

Missouri courts have jurisdiction.

Herman v. Edwards, 238 U. S. 107;
Currency Act of July 12, 1882, Chap. 290, Sec. 4 (U. S. Comp. Stats. 1916, Sec. 9668);
Sixteenth subdivision, Sec. 24 of Federal Judicial Code;
U. S. R. S., Sec. 5136;
Minneapolis v. Bombolis, 241 U. S. 211, 221-223.

ARGUMENT.

I.

A National Bank Has No Authority to Establish or Operate Branch Banks.

A national bank not only has neither express nor implied authority to establish and operate a branch bank, but it is both expressly and impliedly prohibited from so doing. If other terminology than **branch bank** is preferred, then a national bank has no authority, either express or implied, to conduct its **usual business** at **more** than **one office or banking house**; on the contrary, that is both expressly and impliedly forbidden. (Despite the obvious shrinking of the plaintiff in error from the term **branch bank** it will not be overlooked that the ultimate fact **charged** in the information and by the demurrer **admitted** is that the plaintiff in error is conducting a **branch bank** with all that that term properly connotes.)

1. That a national bank has only such powers as are expressly conferred upon it by statute and such additional powers as are necessarily incident to those conferred is settled law in this country. As was said

by this Court in **California Bank v. Kennedy, 167 U. S. 362, l. c. 366:**

> "It is settled that the United States statutes relative to national banks constitute the measure of the authority of such corporations, and that they cannot rightfully exercise any powers except those expressly granted, or which are incidental to carrying on the business for which they are established."

To the same effect is the holding in **Logan County National Bank v. Townsend, 139 U. S. 67:**

> "It is undoubtedly true that the national banking act is an enabling act for all associations organized under it, and that a national bank cannot rightfully exercise any powers except those expressly granted by that act, or such incidental powers as are necessary to carry on the business of banking for which it was established."

2. It is not seriously contended here (although vaguely intimated in the brief of plaintiff in error at page 58 thereof) that a national bank has any express authority to establish or operate a branch bank. (At the bar of the Supreme Court of Missouri it was admitted by plaintiff in error that a national bank had no express power to establish or operate a branch bank, but that the power to establish such a bank

was one of its implied or incidental powers. Moreover, in the memorandum of Mr. Brown, filed by plaintiff in error with the Supreme Court of Missouri and referred to in the brief of plaintiff in error at page 75, which memorandum concludes that branch banks are authorized, it is admitted that the power to establish branch banks is not expressly conferred, but it is contended that it is one of the implied powers of national banks.) However, whether the contention is or is not made that a national bank has the express power to establish or operate a branch bank, the slightest reference to the statutes themselves will at once dispose of that matter.

3. The statute (Sec. 5136) vests national banks with:

> "All such incidental powers as shall be necessary to carry on the business of banking."

The contention of the plaintiff in error is that the power to establish and operate branch banks is such an incidental power as is necessary to carry on the business of banking.

If the word "necessary," as used in this statute, is taken in its ordinary meaning as that which is essential or indispensable to the end aimed at, then it needs no argument to show that branch banks are not "necessary" to the business of conducting a

national bank or to the business of conducting a bank of any character. The Court will take judicial notice of the fact that the vast majority of national and state banks are conducted without branch banks, from which fact it is obvious that branch banks are not essential or indispensable to the banking business.

If, however, the word "necessary" is to be construed here, as probably it should be, as meaning not that which is indispensable, but that which is peculiarly suitable and immediately appropriate to the end aimed at, and if, accordingly, the statute is read as if it conferred upon national banks all incidental powers peculiarly suitable or immediately appropriate to the business of banking, still the conclusion is inevitable that a national bank does not have the right to maintain branch banks.

A national bank is more than a mere private institution. It is a quasi public institution. One of the essential purposes of the laws permitting the incorporation of national banks and regulating them, as well as of all banking laws, whether state or national, is to secure safety to the depositors and the public generally and to protect the interests of the government, which, to a certain extent, utilizes national banks as its agencies. In determining whether a given power is peculiarly suitable or immediately appropriate to the banking business, not only the interests of the stockholders of the bank are to be con-

sidered, but the interests of the depositors and of the public generally. If branch banking is not peculiarly suitable or immediately appropriate to the national banking business, **safely conducted with a primary regard to the interests of its depositors and of the public,** then it is not such an incidental power as is necessary to the banking business. That branch banking is not safe banking is conceded by all authorities that have spoken on that subject. **All such agree, therefore, that a national bank has no implied power to conduct branch banks.**

On May 11, 1911, Attorney-General Wickersham rendered the official opinion of the Department of Justice to the Secretary of the Treasury, in response to the request of the latter for an opinion as to the right of the Lowry National Bank of Atlanta, Georgia, to establish "another office or banking house in that city." In that opinion the Attorney-General arrived at the following conclusion (Opinions of Attorneys-General, 81, l. c. 98), **set out in full in Appendix A herein):**

> "A national bank is not, under its charter, authorized to establish a branch or co-ordinate office for the purpose of carrying on a general banking business in the place designated in its certificate of organization."

While the Attorney-General based his conclusion upon several grounds, others of which are to be

noticed hereafter, one of them was that **a national bank has no implied power to establish a branch bank.** After quoting the statute he said:

> "Clearly, neither of these provisions contain an express or **necessarily** implied power to establish a branch bank. * * * The power to establish a branch bank **is certainly in no respect essential** to the discounting and negotiating of promissory notes, drafts, bills of exchange and other evidences of debt, or of exercising either or any of the incidental powers named in the statute, or of any power which is incident to the carrying on of a general banking business."

In this opinion the Attorney-General cites and refers to two opinions, one rendered by the Solicitor of Treasury on August 10, 1889, and one rendered by the Solicitor of Treasury on November 15, 1910, **both holding that the power to establish branch banks was not one of the incidental or implied powers of a national bank.**

In the opinion of the Supreme Court of Missouri in the present case (Tr. of Rec., p. 10; **set out in full in Appendix C herein**) that Court, after dealing fully with the question as to whether a national bank had the incidental power to establish and operate branch banks, arrives at the following conclusion:

> "The apparent purpose of the establishment of branch banks is to multiply the places of busi-

ness of the principal bank and thereby increase the volume of same. As a manifestation of commercial progress, the effort may well be commended. That phase of the matter, however, is not under consideration. It is a question of power and not progress that demands solution. **Certainly it is in no sense essential to the exercise of any of the powers granted nor is it a necessary incident to the carrying on of the banking business within the meaning of the statute.** * * * The sections of the act reviewed (The National Bank Act) lend no countenance to the contention that the establishment of branch banks is within the scope and purview of these sections and hence not within the law. * * * We have held that the carrying on of the banking business did not require the establishment of branch banks and hence that it was not within the terms of the statute.''

The most complete refutation of the doctrine of implied or incidental power to establish and operate branch banks to be found anywhere is contained in the opinion of the Supreme Court of Kentucky in the case of **Bruner v. Citizens Bank, 134 Ky. 283.** The argument of the Kentucky court in exactly applicable here. The Court said, l. c. 290:

''In this connection the argument is made that, as the statute does not forbid the establishment of branches or make any mention of the matter, it follows that banks should be allowed the same

privileges as other business corporations created under the statute; and, as other business corporations have the authority by implication as a power incident to their business to set up as many branches as they like, so should banks enjoy this privilege. The statute does not in terms authorize commercial or manufacturing corporations to have branch places of business, nor does it deny them this right. The statute is silent upon this subject, both as to banks as well as all other corporations; but it is a matter of common knowledge that all large commercial and manufacturing corporations do have branch places of business, many of them in other states than the home of the corporation, and that at these branches they carry on business in the same way as they do at their main or principal office or place of business. And the right to thus carry on a legitimate business by a corporation duly organized has never so far as we are aware been questioned. It would seem, therefore, that, if banks are to be denied privileges in this respect that are enjoyed by other corporations, some good reason should be advanced to support the discrimination. **That there is sound reason for this discrimination, we think, can be demonstrated.** Primarily it grows out of the peculiar nature of the banking business, and is supported by a fair construction of the statute and by a sound public policy. Banks are quasi public corporations. They may only be organized in such manner and do such things as the state in which they carry on business permits them to do; and

in carrying out its policy the state has surrounded banking privileges with many wholesome restraints that are not applied to ordinary corporations. This is manifested in the various sections of the statute relating to corporations and banks. (There follows here a statement of the regulations thrown around banks as distinguished from those thrown around ordinary corporations.)

"From these general but important distinctions that the Legislature has made between banks and corporations generally, it is apparent that banks cannot be allowed to exercise any functions that are not strictly authorized by law. What a mercantile corporation may do is not the standard by which to measure the powers of a banking institution. They occupy towards the public a very different relation. The number of branches or places of business that the mercantile corporation may establish, concerns no one except the stockholders and the creditors of the corporation. The public generally have no interest in its business nor any right to control or direct its affairs. But the whole body of the public is directly interested in the conduct and management of banking institutions because they are depositories in which is kept practically all the money of the country; and it is with the money so deposited that banks are enabled to successfully carry on a profitable business. * * * The loss occasioned by the failure of a private corporation is generally confined to the stockholders and creditors, while the failure of a

bank brings ruin and disaster to the hundreds and often thousands of people who have placed with it on deposit their earnings, and it is to secure this depositing public from loss that the state through its agencies exercises a supervisory care over banking institutions. To extend by implication the powers of a bank by allowing it to exercise privileges not necessary to carry on the business would be to increase the probability of loss to the public by its mismanagement or failure. While we are not disposed in anywise to curtail the powers essential to the proper conduct of the business, it does not seem to us that the establishment of branches is either prudent or necessary. **Looking at the matter from a business standpoint, it is important that a bank should only have one place of business.** The management and safe investment of money requires constant and painstaking care and attention, as well as sound and discriminating judgment on the part of the officers of a bank. * * * But, if branches were established, they must in the necessity of things be left almost exclusively to the persons immediately in charge, free from the influence and presence of the officers and directors, and this practice would not in our judgment be conducive to safe and conservative banking methods. * * *

"If branches were necessary to enable banks to carry on their business, we would not be disposed to interfere with their establishment; but this feature of the case does not present any difficulty, because it cannot be said that branches

are necessary to enable a banking institution to fulfill the purposes of its creation, although they might widen the field of its opportunities and increase its capacity to earn money for its stockholders. But neither the prospect of advantage to the stockholders nor the convenience to the community in which the branch is located should be allowed to have much weight in determining the wisdom or advisability of their existence. The important consideration is the security of the public, and **that the public will be better protected by not allowing banks to establish branches we have little doubt.** This matter of branch banks by implication or as an incident to the power to carry on a banking business is a comparatively new feature that has been introduced in some banking circles, and is a departure from the rule that has obtained in this state from the beginning. When banks were incorporated under special laws, it was not unusual for the Legislature to give them by express authority the right to establish branches; and, under the authority so granted, several branches were in operation when the present general law upon the subject of banking was enacted, but when the Legislature came to enact this general law under which all state banks have their existence and from which they derive all their powers, it omitted all reference to branch banks, although it must have been within the knowledge of practically all the members of the General Assembly that branch banks were being conducted under special acts. **The fact that no provision was made in the general law for branch**

banks is significant as illustrating that it was not the purpose or policy of the state to further encourage or permit them. If the General Assembly had deemed it wise to permit banks to establish branches, it would have so declared, and the failure to speak on so important a subject furnishes strong reason why **this privilege not necessary to the enjoyment of the powers conferred by the statute and the charters obtained thereunder should not be conferred by implication.**" (Note. An exact parallel exists between the situation here discussed and that in connection with the National Bank Act.) "In addition to this, when the Legislature fixed the amount of capital stock that a bank must have before commencing business, graded in some respects according to the population and needs of the community where the bank was to be located, it was certainly not contemplated or intended that upon this capital designed to be employed in one locality a bank might set up an unlimited number of branches and do a volume of business upon money received from depositors in widely separate communities entirely disproportionate to the capital invested. The capital stock of a bank and the double liability of the stockholders is the security to which depositors must look for the protection of their deposits and to permit a bank with a capital of say $15,000 to have a number of branches doing a general banking business would greatly lessen the security of the depositors, and at the same time increase the probability of loss. It seems to us

that, if branch banks are to be allowed, there should be set apart for the use and benefit of each branch not less than the amount of capital stock required in the organization of banks, and this was the policy pursued by the Legislature in permitting banks incorporated under special acts to have branches at different places in the state. But the scheme under which it is insisted that the Citizens' Bank of Shelbyville and other institutions may establish branches does not contemplate or provide that there shall be any increase in the capital stock; the argument being that, when a bank is organized with the capital required by law for the conduct of the banking business in the place at which it is proposed to locate the bank, it may without any increase in its capital set up as many branches as it chooses, and where it pleases, and at these various places do a general banking business without any capital set apart for the purpose, although each of these branches is in itself virtually a distinct and complete banking institution, exercising and enjoying all the powers and privileges conferred upon chartered banks, and yet free from the duties and obligations imposed by law upon incorporated institutions. **We cannot give our assent to a scheme like this.**"

To similar effect is the holding of the Supreme Court of North Carolina in the case of **Morehead Banking Company v. Tate, 122 N. Car. 313.** So, also,

to the same effect are all of the text writers. We cite the following:

> Magee on Banks and Banking (2nd Ed.), 1913, pp. 42-45;
> Pratt's Digest of Federal Banking Laws, 1920 Ed., p. 110, and 1922 Sup. thereto, p. 7;
> Morse on Banks and Banking, Sec. 46;
> I Morawetz on Corporations, Sec. 387;
> Zane on Banks and Banking, Sec. 24.

Plaintiff in error contends that the power to establish and operate branch banks is essential and necessary to the business of banking. This contention it makes notwithstanding that **every official opinion that has been rendered, dealing with the subject, every judicial decision passing on the matter of branch banks, and every text writer discussing powers of banks in this connection, without a single exception, hold that the power to establish and operate branch banks is neither necessary, essential nor suitable to the business of banking, safely conducted.**

There is not one official opinion, either executive or judicial, nor a single recognized authority on banking agreeing with the position here taken by the plaintiff in error.

The very last official declaration upon the subject of the suitableness of branch banking is that of the Comptroller of the Currency made on the 15th day of

August, 1922 (set out in full in the brief of the Attorney-General filed in this case in the Supreme Court of Missouri, its authenticity unquestioned then or since by plaintiff in error):

> **"If it had been my duty to make the laws of the various states of the Union, I should not have permitted branch banking."**

4. Not only has a national bank no express or implied authority to establish and operate a branch bank, but it is **expressly** restricted by the statute to a single banking house. Section 5190 (U. S. R. S.) reads:

> **"The usual business of each national banking association shall be transacted at an office or banking house located in the place specified in its organization certificate."**

Plaintiff in error contends that this section does not restrict a national bank to a single banking house. An Attorney-General of the United States, two solicitors of the Treasury, the United States District Court for the Southern District of Ohio, the Supreme Court of Missouri, and the text writers have all agreed that **this section does restrict a national bank to a single banking house and, therefore, prohibits branch banking.**

Attorney-General Wickersham, in the opinion cited, supra, said on this point (29 Opinions Attorney-General 81, l. c. 92, 98):

"* * * If there were any provision elsewhere in the national banking laws which clearly implied that such authority existed, by subtle process of reason, this section could be construed to be consistent therewith. But in the absence of such language elsewhere in the act, and in view of the general principle that banks cannot establish branches unless the power to do so is granted, it appears to me that the natural meaning of this section is that the general banking business of a national bank must be conducted in **one** office or banking house, within the place designated in its organization certificate.

* * * * * * *

"Section 5190, properly construed, restricts the carrying on of the general banking business by a national bank to one office or banking house in the piace designated in the association certificate of organization."

In his opinion rendered on August 10, 1889 (set out in Magee on Banks and Banking, 2nd Ed., p. 44), Mr. Hepburn, Solicitor of the Treasury, construing this section, said:

"This section (5190, U. S. R. S.) contemplates that the usual business of a national banking association shall be transacted at one office or

banking house, and as receiving deposits and paying checks belonging to the 'usual business of the bank,' I am of the opinion that the statute does not authorize the establishment of an auxiliary cash room in a different part of the city for the purpose proposed. Besides, it may be observed, that if a national banking association can lawfully establish and maintain a separate office for receiving deposits and paying checks it could as well establish as many auxiliary cash rooms in the city of its corporate residence as its business might require; and indeed, the entire business of the bank may be parceled out and conducted in the same way all over the city."

The District Court of the United States for the Southern District of Ohio in **Armstrong v. Second National Bank, 38 Fed. Rep. 883,** construing this section, said:

"Under this section (5190) it certainly would not be competent for a national bank to provide for the cashing of checks upon it at any other place than its office or banking house."

The Supreme Court of Missouri in the present case (Tr. of Rec., p. 9), construing this section, said:

"The purpose of section 5190 is not for the information of the comptroller, it being a matter with which he has no concern when he has

granted the articles as to where the place of the business shall be located within the county, city or town. This is a matter to be determined by the board of directors in establishing the business. To render their act specific it must be confined to the terms of the statute, viz.: to 'an office or banking house within the county, city or town' named in the articles. This location having been established, it is within the contemplation of the statute that the power of the bank is to be there exercised. Otherwise the words 'an office or banking house' cease to be specific, and instead of being singular in number may be construed as plural, and thus permit the establishment of banks in as many places within the county, city or town as the judgment of the directors may prompt. **Such a construction finds no resting place in reason. If followed it would, instead of centralizing and rendering more stable the powers of a bank, enable it, by multiplying its places of business, to subdivide and at the same time extend its powers in such manner as to stifle competition. Such an effect was certainly never contemplated by the banking act.**"

See, also, Pratt's Digest of Federal Banking Laws, 1920 Ed., p. 100.

But if we did not have the aid of the authorities just quoted, still there would be no possibility of arriving at any other conclusion than that section 5190 restricts national banks to a single banking house for the transaction of their "usual business." They

must transact their usual business at "an office or banking house." Certainly the usual meaning of the word "an" is **one.**

Funk and Wagnall's New Standard Dictionary defines the words: "a"—"an" as follows:

> " 'a'—one; any; some; each; expressing singleness, unity, etc.; more or less indefinite.
>
> " 'an'—one, or any, when not emphasized used like the article 'a'."

Webster's New International Dictionary defines the word "an" as follows:

> " 'an'—one or any; without special emphasis on the number. It is used before nouns in the singular number denoting an individual object."

The definition of "an" in Corpus Juris (2 C. J., page 332) is as follows:

> "The word 'an' originally meant one. It is seldom used to denote plurality."

Black's Law Dictionary, 2nd Ed., page 67, defines the word "an" as follows:

> "In statutes and other legal documents it is equivalent to 'one' or 'any'. It is seldom used to denote plurality."

Among the judicial decisions holding that the articles "a" and "an" indicate the singular we cite the following:

> Hastings v. Brown, 1 El. & Bl. 451, l. c. 454, 118 Eng. Rep. Full Reprint, 505, l. c. 506;
> Moyahan v. City of New York, 205 N. Y. 181;
> People v. Ogden, 8 Appellate Div. 464, l. c. 467—40 N. Y. Supplement 827;
> Wastl v. Montana Union Ry. Co., 61 Pac. 9, l. c. 15;
> Wades v. Figgatt et al., 75 Va. 575, l. c. 582.

It is the context, however, in which the article "an" is used in section 5190 that makes it certain that it is there used in its original sense as meaning "one." The section does not say "an office **or offices**," nor does it say "a banking house **or banking houses**." It says, "an office **or banking house**," using the singular noun as well as the singular adjective. Moreover, it says "usual business," employing here also the singular, implying an indivisible entity, something that naturally would be confined to a single **place** of business.

The theory of plaintiff in error that the purpose of Congress in enacting section 5190 was to insure the carrying on the business of a national bank in "an office or banking house" rather than upon **the curb or under somebody's hat or hoopskirt** (see brief of plaintiff in error, page 68) must assume that Con-

gress deemed it necessary to legislate to prevent such a method of carrying on the banking business. **But when, in the long history of banking, was that business carried on otherwise than within an office or banking house? Did Congress solemnly legislate to prevent an evil which never existed?** On the other hand, branch banking was a real and existing evil at the time of the enactment of the National Bank Act. What was more natural and reasonable than that Congress, in 1863, to prevent that evil in the national banking system, should have, as it did, expressly restricted the banking business to a single office or banking house?

5. The very absence from the National Banking Act of an express permission of branch banks amounts to an **implied prohibition of the power to establish them.**

We do not mean to say, of course, that the mere absence of express recognition of any implied power amounts to an implied prohibition thereof (such a contention could not be reconciled with the doctrine of implied or incidental powers), **but we do say that the absence of express recognition of a power of such magnitude and importance as that of establishing, maintaining and operating branch banks does amount to an implied prohibition.**

In **California Bank v. Kennedy, 167 U. S. 362, l. c. 366,** wherein it was contended that a national bank

had the implied power to acquire stock in another corporation, this Court said:

> "It is clear, however, that a national bank does not possess the power to deal in stocks. **The prohibition is implied from the failure to grant the power.**"

And in **First National Bank v. National Exchange Bank, 92 U. S. 122, l. c. 127,** dealing with the same question, this Court said:

> "Dealing in stocks is not expressly prohibited, but **such prohibition is implied from the failure to grant the power.**"

The power sought here by the first National Bank is not to do something that is properly incidental to any of the express and essential powers granted to national banks, but the power to conduct several general banking businesses in the same city. It has authority to conduct a general banking business in the City of St. Louis. To conduct **a second** general banking business is not in any true sense **incidental** to the conducting of **a** general banking business. What is asked for is **of the same importance** as the principal power granted, rather than something merely **incidental** thereto. It is not possible that Congress intended that a power of such importance could be

evolved from powers incidental to the general powers expressly conferred.

At the time of the adoption of the present National Bank Act (1863), branch banking, although unusual and regarded with disfavor, was well known. Branch banks had been expressly permitted under the first United States Bank Act and under the second National Bank Act. Moreover, at the time of the adoption of the present (or third) National Bank Act, state branch banks were permitted by express statutory authority under carefully prescribed regulations in a number of states. Branch banking and its corollary, the centralization of banking power, was a subject of bitter controversy. Under such circumstances, the failure to expressly grant the power to establish branch banks amounts to an implied prohibition. That is particularly true in view of the further fact that the National Bank Act makes no provision whatever for regulating branch banks, their number, location, etc., the amount of capital to be prorated to each, or the method and manner of conducting them. As Attorney-General Wickersham put this matter in his opinion cited, *supra*:

> "In a branch bank bills of exchange are negotiated and discounted; moneys received for deposit; exchange, coin and bullion are bought and sold; money is loaned, and every kind of banking business that is authorized is there trans-

acted, unless it be the issuing and circulating of bank notes. In proportion to the amount of business transacted, the same capital is required to run the branch bank as to operate the parent bank. In the city of Atlanta no national bank can be organized for a less capital than $200,000; and if a national bank in that city, having a capital stock of $200,000, should establish a branch bank therein, **the practical result would be that two banks would be in operation on a capital upon which only one bank is authorized to do business in that city; and each additional bank would, of course, constitute a further division of the capital in violation of the spirit of this section of the statute.**

"Furthermore, I have carefully examined the national banking laws, and **I fail to find any provision which empowers the comptroller to restrain or to regulate in any manner the conduct of a national bank with reference to the establishment and maintenance of branch banks.** He is authorized and directed to approve of the name assumed by the association (Sec. 5134, Rev. Stat., par. 1); when notified that 50 per cent of the capital stock has been paid in, and the laws have otherwise been complied with, he is required to examine into the condition of the association, the name and place of residence of its directors, the amount of capital stock of which each is the owner in good faith, and whether such association has complied with all the provisions of the act, and shall cause a proper statement to be attested by oath of a majority of its directors

and the president and cashier; and, if after such examination it appears that the association is lawfully entitled to commence the business of banking, it is his duty to issue a proper certificate to that effect (Secs. 5168 and 5169, Rev. Stats.); he is required to approve the increase of capital stock (Act of May 1, 1886, Sec. 1; Sec. 5142, Rev. Stat.), and also the decrease of the capital stock (Sec. 5143, Rev. Stat.); he can, at his discretion, extend the corporate existence of the association (Act of July 12, 1882, Sec. 9; 22 Stat. 162); he must approve reserve agents of the association (Secs. 5192 and 5195, Rev. Stat.); he is required to give notice to an association that is short in reserve funds (Sec. 5192, Rev. Stat.); he must approve the change of name and location of a bank (Act of May 1, 1886, Sec. 2; 24 Stat. 18) and shall also approve of the conversion of state banks into national banks (Sec. 5154, Rev. Stat.); but **there is no provision directing or authorizing him to exercise any power whatever with reference to the location of a branch bank or the terms and conditions upon which such a branch bank may be established and maintained.**

"Can it be supposed that if Congress intended to authorize the establishment of branches by national banks, no restraint whatever would have been thrown around the exercise of such power, and that the comptroller, who in all other respects is given such ample power of control over the existence and conduct of banks, would not have been vested with some power or control

over the location of such branches and the manner in which the same should be established and conducted?

"If, under the laws as they now exist, a national bank has the power to establish a branch, the exercise of that power is entirely within the discretion of the board of directors of the association, and it may be exercised without any restraint whatever; and the Lowry National Bank can establish not only one branch in the city of Atlanta, but any number of branches, without consultation with the comptroller with reference thereto. **Such an unrestrained power, it appears to me, would be fraught with the most serious danger and would result in an inflation of banking business upon insufficient capital, and in an inadequate means of supervision and control over a bank's business by the chief officials in authority, which in all probability would bring disaster to the welfare and reputation of the national banking system.**"

6. What has been shown by the foregoing considerations to be the only possible and reasonable construction of the United States statutes relative to the power of national banks in connection with branch banking has been also the uniform construction placed upon the National Banking Act by the legislative branch of the government—the Congress, and by that department of the Federal Government whose duty it is to enforce the National Banking Act,

namely, the Treasury Department, and, within that department, the Comptroller of the Currency.

That legislative and executive construction is of compelling force has always been recognized by this Court. As to legislative construction, the rule is thus stated in 36 Cyc 1142:

> "A construction of a statute by the legislature, **as indicated by the language of subsequent enactments**, is entitled to great weight."

As the rule was stated by this Court in **United States v. Freeman, 3 Howard 556, l. c. 564**:

> "If it can be gathered from a subsequent statute in pari materia what meaning the legislature attached to the words of a former statute, they will amount to a legislative declaration of its meaning, and will govern the construction of the first statute."

The rule as to the force of executive construction is equally well settled. As stated in 36 Cyc 1140:

> "The construction placed upon a statute by the officers whose duty it is to execute it is entitled to great consideration, especially if such construction has been made by the highest officers in the executive department of the government, or has been observed and acted upon for many years, and such construction should not be disregarded or overturned unless it is clearly erroneous."

In **United States v. Cerecedo etc. v. Compania, 209 U. S. 338,** it was said that:

> "When the meaning of a statute is doubtful, great weight should be given to the construction placed upon it by the department charged with its execution" (Robertson v. Downing, 127 U. S. 607; United States v. Healy, 160 U. S. 736).

And in **United States v. Finnell, 185 U. S. 236, l. c. 244,** the same rule is stated as follows:

> "Of course, if the departmental construction of the statute in question were obvious or clearly wrong, it would be the duty of the court to so adjudge; * * * but if there simply be doubt as to the soundness of that construction * * * the action during many years of the department charged with the execution of the statute would be respected and not overruled except for cogent reasons."

Now on three separate occasions subsequently to the original enactment of the National Banking Act Congress, under unusual circumstances, has specifically authorized national banks to establish branch banks. This was done when an act was passed enabling state banks having branches under express authorization of state laws to retain such branches (but not to establish others) upon their conversion to national banks (Section 5155, R. S. U. S.). It was done again in an

act approved May 12, 1892, authorizing national banks to open branch banks within the exposition grounds at the Chicago Exposition. It was done again by a similar act approved March 3, 1901, in connection with the Louisiana Purchase Exposition. None of these acts were necessary if national banks had the right, without such express authorization, to establish and operate branch banks. The enactment of such special acts, as Attorney-General Wickersham pointed out in his opinion, cited supra, was unnecessary "if the power existed for national banks to have branches." Here was a clear recognition by Congress of the absence of such power in national banks generally.

The consistent construction placed by the Treasury Department, which is charged with the execution of the National Banking Act, has been that national banks could not establish branch banks. The earliest recorded declaration upon that subject is the opinion of the Solicitor for the Treasury, under date of August 10, 1889. That was followed by an opinion of the Solicitor of the Treasury, under date of November 15, 1910, and by the opinion of the Attorney-General of the United States, rendered to the Secretary of the Treasury, under date of May 11, 1911. The instructions of the Comptroller of the Treasury have uniformly carried that construction. For example, in the instructions of the Comptroller,

issued in 1909, and cited in the Attorney-General's opinion, supra, at page 97, was the following:

> "The word 'place' and 'at an office or banking house' (as used in section 5190) **have always been construed by the comptroller to mean the legal domicile of the corporation, of which it can have but one.**"

In 1920 in the last available printed instructions of the Comptroller of the Currency (see instructions of the Comptroller of the Currency relative to organization and powers of national banks, 1920, pages 110-112, inclusive) **the same construction of the United States statutes is continued and fully explained and elaborated. We have set out these official instructions of the Comptroller in full in Appendix B hereof.**

On the 15th day of August, 1922, the Comptroller of the Currency issued this statement:

> "I have particularly ruled in every instance that no branch office or agency would be authorized by me in states where state institutions would not have like facilities. It ought to be clear and it is fair, and there is no reason for anybody misunderstanding it. I have, on the other hand, permitted national banks in large cities of states that permit state banks and trust compaies to have agencies or offices, the privilege to have like agencies or offices. If it

had been my duty to make the laws of the various states of the Union, I would not have permitted branch banking."

In Pratt's Digest of Federal Banking Laws, a recognized authority on national banks, 1920 edition, page 100, it is said:

"It is settled beyond doubt that a national bank, independently of the National Bank Act, is not, under its charter, authorized to establish a branch bank for the purpose of carrying on a general banking business in the place designated in its certificate of organization, or anywhere in the United States; and, furthermore, that Section 5190, U. S. R. S., properly construed, restricts the carrying on of a general banking business by a national bank to **one** office or banking house in the place designated in the association's certificate of organization, except in so far as that section is amended by Section 25 of the Federal Reserve Act, which permits foreign branches under certain conditions."

In the 1922 Supplement to Pratt's Digest of Federal Banking Laws, 1920 edition, which supplement contains all amendments and new rules and regulations to **November 1, 1922,** it is said (p. 7, sec. 7):

"**Additional Offices of National Banks.**—Note to Sec. 109, page 100, Pratt's Digest, 1920.

"The Comptroller of the Currency is permitting national banks located in large cities in

states where state banks or trust companies have offices, agencies or branch banks to establish additional offices in the same city where their principal office is located. Each case will be considered on its merits and applicants should show conclusively competition for state institutions, with branches, and the need for additional offices in order to meet such competition.

"A showing should be made also as to the necessity for an office in the locality where it is proposed to locate.

"The following quotation from a recent letter of Comptroller of the Currency Crissinger to Senator McCormick, sets forth the Comptroller's position in this matter:

> " 'I am not authorizing the establishment of branch banks, but have been permitting national banks in states where state banks and trust companies have offices, agencies or branch banks to establish additional offices in some of the large cities where it is necessary to meet the competition of state banks that have literally taken possession of cities with branch banks or offices, and these facts are notorious and are well known to all state bankers of the country.' "

If the foregoing evidences, covering a period exceeding thirty years, do not show a uniform and consistent and settled departmental construction, it is difficult to conceive how such a departmental con-

struction is to be established. Not a single instance of a contrary ruling under circumstances such as the present, affecting a national bank in a state where state banks are denied the privilege of having branches, has been or can be shown. **It is noticeable that the plaintiff in error does not claim to have obtained, and it did not obtain, authorization from the Comptroller of the Currency to establish any branch bank.** It acted in defiance of the established construction placed upon the law by the federal government, in defiance of the rulings of the Department of Justice, the Secretary of the Treasury and the Comptroller of the Currency; in short in defiance of the laws of the United States as construed by those charged with their enforcement. It dared to play the outlaw, alike contemptuous of the welfare and rights of all other banks whatsoever in St. Louis, of the laws of the state of its domicile and of the sovereignty whose sanctity it now so anxiously undertakes to protect.

Plaintiff in error seeks to weaken the contention that there has been a settled departmental construction of the National Banking Act adverse to its claims (see p. 75 of the brief of plaintiff in error) by pointing to what it denominates an opinion written by Mr. Wrisley Brown, at one time a special assistant to the Attorney-General. It is noticeable, however, that no citation is given in connection with

that statement. It was not an official opinion. It was a memorandum prepared for the Attorney-General and presumably rejected by him. It is somewhat far-fetched to argue that such a rejected memorandum lessens the force of the official opinion actually rendered by Attorney-General Wickersham or makes the ultimate conclusion of the Department of Justice less indicative of departmental construction.

It is indeed true that a departmental construction is not conclusive even when, as here, it is buttressed and reinforced by manifold other arguments, but we have no doubt that it will take more to overcome it than the belated discovery of a hitherto hidden and unsuspected incidental power.

7. The course of conduct of national banks relative to branches, the attitude of Congress relative thereto, and the rulings and attitude of the Treasury Department have fixed a positive policy of limitation against branch banks in the United States since 1863. That policy has been recognized by this Court. In **First National Bank v. Hawkins, 174 U. S. 364, l. c. 369,** the Court said:

> "Another evil that might result, if large and wealthy banks were permitted to buy and hold the capital stock of other banks, would be that, in that way, the banking capital of a community might be concentrated in one concern, and busi-

ness men deprived of the advantages that attend competition between banks. Such accumulation of capital would be in disregard of the policy of the national banking law, as seen in its numerous provisions regulating the amount of the capital stock and the methods to be pursued in increasing or reducing it. **The smaller banks, in such a case, would be in fact, though not in form, branches of the larger one.''**

This case, it is true, was not dealing directly with the question of branch banks. It recognizes, however, that the policy of the national banking law is directly against the evil of concentration of the banking business of one community in a single concern which would be the inevitable result of a permission of branch banking and it characterizes whatever is in fact branch banking, even though it may not be so in form, **as hostile to the policy of the national banking law.**

The policy of the national banking law against branch banking has been recognized and followed by the State of Misouri and many others in the adoption of state laws prohibiting state banks from establishing and operating branch banks. What consideration could now justify the overturning of a national policy so long and so firmly established and so well recognized, and the consequent certain destruction of state banks in those states which prohibit branch

banks? If it be true, as is contended by plaintiff in error here, that national banks are at a disadvantage in those states in which branch banks are permitted, or, if it be true, that changing economic conditions demand an alteration in the policy of the nation in this respect, is not the equitable and just course to be pursued that of appealing to Congress for an alteration in the law, such as will at the same time protect the interests of national banks and secure from annihilation the state banks?

It appears there is no lawful authority from the nation for a national bank to open or operate branch banks in any state. Further, the opening and operating of branch banks is prohibited by section 5190.

The unlawful branch banking here involved is conducted by the bank in Missouri.

Missouri, in 1915, after the Federal Reserve Act of 1913, set to work to frame and did frame a banking act believed for safety at least the equal of the banking laws of any state in the Union. The laws, in passing, were framed to permit of state banks availing themselves of membership in the federal reserve system, and to that end the laws were frank copies in many respects of the National Bank Act.

The United States had had, under the 1791-1811 United States Bank Act and under the 1816-1836 Second United States Bank Act, experience with a

mother bank located under the first law at Philadelphia and under the second at Washington, and with branch banks at various other cities in the United States.

States in imitation had adopted the branch bank scheme.

The branch bank scheme represented in its essence centralization of banking power.

The working of branch banks had not proved popular either in nation or states. The great Central West resented the whole notion.

The Second United States Bank was not rechartered in 1836.

National branch banking then ended.

When the present National Bank Act was framed, therefore, the plan was for decentralized banks, each individually independent of the others.

As has been shown, there was no authority for branch banks and branch banking was by section 5190 prohibited.

Missouri had had branch banks. She gave up that system, too.

The present Missouri sections covering the question in hand are Sections 11684 and 11737, R. S. Mo. 1919.

Section 11684, Revised Statutes of Missouri of 1919,

referred to by the Missouri Supreme Court, is as follows:

"Sec. 11684. **Prohibition of Banking Business.**—No corporation, domestic or foreign, other than a corporation formed under or subject to the banking laws of this state or of the United States, except as permitted by such laws, shall by any implication or construction be deemed to possess the power of carrying on the business of discounting bills, notes or other evidences of debt, of receiving deposits, of buying and selling bills of exchange, or of issuing bills, notes or other evidences of debt for circulation as money, or of engaging in any other form of banking; nor shall any such corporation, except an express company having contracts with railroad companies for the operation of an express service upon the lines of such railroad companies, or a trans-atlantic steamship company, or a telegraph or telephone company, possess the power of receiving money for transmission or of transmitting the same, by draft, traveler's check, money order or otherwise (Laws 1915, p. 108)."

The section of Revised Statutes of Missouri 1919, prohibiting branch banks is as follows:

"Sec. 11737. **Rights and Powers.**—Every such corporation shall be authorized and empowered:

"1. To conduct the business of receiving money on deposit and allowing interest thereon not exceeding the legal rate or without allowing in-

terest thereon, and of buying and selling exchange, gold, silver, coin of all kinds, uncurrent money, of loaning money upon real estate or personal property, and upon collateral or personal security at a rate of interest not exceeding that allowed by law, and also of buying, investing in, selling and discounting negotiable and non-negotiable papers of all kinds, including bonds as well as all kinds of commercial paper; and for all loans and discounts made, such corporation may receive and retain in advance the interest; **provided, however,** that **no bank shall maintain in this state a branch bank** or receive deposits or pay checks except in its own banking house."

The Missouri Supreme Court, in the case at bar holds these sections prohibit the character of branch banking here involved.

The act of the First National Bank in engaging in branch banking in St. Louis, Missouri, is an act outside the bounds of the bank's authorized activities, and is, in addition, an act prohibited by the United States Revised Statutes, Section 5190. Branch banking is likewise an act prohibited under the laws of Missouri.

II.

The Right and Duty of Missouri to Suppress the Usurpation.

Branch banking by a national bank as an act of usurpation outside the ambit of its power and authority to rightfully engage in, is non-national bank in character, and a national bank is not acting as such nor as an agency or creature of the Federal Government when it engages in branch banking.

The attitude of both sovereignties with respect to branch banking being the same, and the act of usurpation of the First National Bank in engaging in unauthorized branch banking in Missouri being non-national bank in character, either sovereignty may properly put a stop to the usurpation.

And particularly may Missouri so act when the ultimate decision rests on appeal, as here, with the Supreme Court of the United States.

(1) Has a national bank the right to engage in branch banking at any place in any state, and particularly in Missouri, which prohibits branch banking?

(2) If not (as it has been shown it has not), then can and should the unauthorized, prohibited, non-national bank, branch banking operations of the First National Bank in the State of Missouri, against

Missouri, against its welfare and its banking system be suppressed by either the United States or Missouri, or does the right and duty to suppress this unwarranted "warfare upon legitimate creations of the state" rest, as contended by the bank, with the nation alone?

The contention of the bank is in effect that a national bank may do anything in the state of its location that Congress could give it the right to do; that Congress has the power to permit the bank to engage in branch banking, and that even though Congress has not granted national banks the power to have branch banks, still it could have granted such power and therefore a state cannot interfere with the ungranted "grantable" power of engaging in branch banking.

No authorities are cited to support the proposition.

Must Missouri remain content while this bank makes unwarranted warfare on the legitimate institutions of Missouri and supinely wait for the action of a Federal Comptroller of the Currency that for nearly a year has failed to materialize, though the Comptroller has recognized, and in public statements, that the action of the bank was without warrant or authority or, on the other hand, may Missouri through her officers act in the interest of both nation

and state to suppress the unwarranted usurpation against both?

It is true that in the Van Reed case (198 U. S. 554) this Court said:

> "National banks are quasi public institutions and **for the purpose for which they are instituted** are **national** in their character, and **within constitutional limits** are subject to the control of Congress and are not to be interfered with by state, legislative or judicial action, except so far as the law-making power of the government may permit."

If, as here, the operations of a national bank are **not** national in their character and the national bank acts not within but outside of constitutional limits, or otherwise outside the the scope of its constitutional authority, and acts within the territory of the state, then such bank appears subject to the control of the state within the rule as above stated in the **Van Reed** case.

The same idea is in **McClellan v. Chipman, 164 U. S., l. c. 356-359:**

> "First. National banks are subject to the laws of the state, and are governed in their daily course of business far more by the laws of the state than of the nation. All their contracts are governed and construed by state laws. Their

acquisition and transfer of property, their right to collect their debts, and their liability to be sued for debts, are all based on state law. It is only when the state law incapacitates the banks from discharging their duties to the government that it becomes unconstitutional (National Bank v. Commonwealth, 9 Wall. 362).

"Second. National banks are instrumentalities of the Federal Government, created for a public purpose, and as such necessarily subject to the paramount authority of the United States. It follows that an attempt by a state to define their duties, or control the conduct of their affairs, is absolutely void, **whenever such attempted exercise of authority expressly conflicts with the laws of the United States, and either frustrates the purpose of the national legislature or impairs the efficiencies to discharge the duties for the performance of which they were created** (Davis v. Elmira Savings Bank, 161 U. S. 275, 283)."

The Court will understand that the purpose of the information filed in this case is not to deprive the bank of any right granted to it by the laws of the United States nor to affect any of its legitimate operations in Missouri. Nor is the information in any sense against the life of respondent or any of its legitimate activities anywhere. The information charges respondent with setting up and operating a branch bank and with threatening to open and operate many

more like institutions without warrant, without authority, and against the laws of the nation and the state. As to the establishment and operation of branch banks, respondent is without authority from any source whatsoever, and the establishment, therefore, of such institutions is a corporate usurpation of authority and an illegal invasion of the rights of the state and of the government, and such operations are not bank operations under the law.

In the case of **First National Bank v. Fellows, 244 U. S. 416**, it appeared that Congress had granted national banks the power to act as trust companies when such operation would not be in contravention of local or state law; and that in pursuance of this authority the Federal Reserve Board had granted a permit to a national bank in Michigan to act as a trust company. In this condition of affairs the Attorney-General of the State of Michigan, by quo warranto from the Supreme Court of Michigan, questioned the right of a national bank operating in Michigan to act as a trust company under such federal law and under such permit from the Federal Reserve Board. The Michigan Supreme Court held that the act of Congress giving such authority to national banks was unconstitutional and, therefore, held that the national bank in Michigan could not there operate as a trust company.

The Supreme Court of the United States first considered the question of whether the Supreme Court of Michigan had jurisdiction to determine whether or not the act of Congress was constitutional. The Supreme Court of the United States determined that the Supreme Court of Michigan did have such jurisdiction. It upheld the jurisdiction of the Supreme Court of Michigan on two grounds: First, because the act of Congress granting authority to a national bank to act as a trust company provided that the permit should be given "when not in contravention of local or state law"; and, second, the jurisdiction of the Michigan Supreme Court was upheld because of the fact that such controversies were by federal statute properly referable to state courts.

The case at bar is a much stronger case for state jurisdiction than the Fellows case.

It will be noted here that the Supreme Court of Michigan was recognized as having jurisdiction to determine the constitutionality of a federal law granting authority to a national bank. In the case at bar the Missouri Supreme Court was not called on to declare any act of Congress to be invalid or illegal, but was called on to uphold and enforce the national law and the national public policy, both of which are in exact accord with the law of Missouri and the settled public policy of Missouri. Certainly, therefore, in the instant case Missouri should have the

right to prevent the bank from violating both national and state law by conduct in opposition to the public policy of both nation and state. And this Court in that case held Section 13-K of the Federal Reserve Act authorizing the Federal Reserve Board to grant national banks the power to act in fiduciary capacities was constitutional **because such power was necessary to keep national banks from being annihilated by the competition of state banks and trust companies having fiduciary powers.** This Court thus recognizes that state and national banks should function in the same competitive atmosphere.

So, likewise, in **American Bank v. Federal Reserve Bank,** 256 U. S. 350, 359, this Court held, in a suit brought in a state court and removed to a federal court, that a state bank could enjoin the Federal Reserve Bank from an unwarranted "warfare upon legitimate creations of the state," namely, state banks.

Not forgetting that the conduct of respondent complained of is nonbanking conduct, outside of any law, beyond all authority, and in defiance of law, and that Missouri in this matter is simply seeking to act in accord and not in conflict with the policy and the law and the authority of the United States, no authority has been adduced against the right of Missouri to act to suppress the usurpation.

Authorities, however, are available in favor of the right of the state to act.

In **First National Bank v. Commonwealth, 143 Ky. 816, 34 L. R. A. (n. s.) 54,** the question involved was whether land not used by a national bank for its national banking business could be escheated under the Kentucky law to the State of Kentucky. The national and state laws were in effect the same, that a national bank must confine its land holdings to land used for its bank building. The Court held that the land could be escheated to the state. Objection was made that the bank was an agency of the Federal Government; that Congress had provided a complete system of control and regulation and that the state had no authority to in any manner interfere with the affairs of national banks, and that state laws applicable to domestic and other corportions were wholly inoperative as to national banks, and that the state was without power to limit the quantity of real estate a national bank might own and hold. The following discussion of this question was had, and the Court states in conclusion (**57 l. c.**):

> "In other words, our opinion is that, while the state cannot, by either Constitution or legislation, directly or indirectly, regulate or control the organization or conduct of national banks, **so as to interfere** with the legitimate business for which they were created, its laws applicable to banks and other corporations may be invoked against national banks when they attempt to

exercise rights or do things outside the scope of the business they were created to carry on, and that are not essential to their existence or efficiency. **We think that when a national bank exceeds the purpose of its creation and goes beyond the scope of its functions as a national banking institution, that the state may deal with such of its transactions as are in excess of the authority conferred by Congress and in violation of the laws of the state, as it would deal with the business or property of any other banking corporation.**

"This view finds support in the Davis case, supra, where the court said: 'Nothing, of course. in this opinion is intended to deny the operation of general and undiscriminating state laws on the contracts of national banks, so long as such laws do not conflict with the letter or the general objects and purposes of congressional legislation.' Also in McClellan v. Chipman, 164 U. S. 347, 41 L. Ed. 461, 17 Sup. Ct. Rep. 85, where an insolvent debtor conveyed to a national bank real estate, thereby giving it a preference. The conveyance was assailed under the Massachusetts statute by other creditors as a preference. The bank resisted the right of the other creditors to question the conveyance, upon the ground that under the act of Congress national banks were entitled to take conveyances of real estate to secure pre-existing debts, and that the provisions of the Massachusetts statute were in conflict with the act of Congress. In the course of the opinion, holding that the state law was not in conflict

with the act of Congress, and that the other creditors had a right to share in the property conveyed to the bank, the court said:

" 'National banks are subject to the laws of the state and are governed in their daily course of business far more by the laws of the state than of the nation. All their contracts are governed and construed by state laws. Their acquisition and transfer of property, their right to collect their debts, and their liability to be sued for debts, are all based on state law. It is only when the state law incapacitates the banks from discharging their duties to the government that it becomes unconstitutional.' * * * Nor is there anything in the statutes of the State of Massachusetts here considered which in any way impairs the efficiency of national banks or frustrates the purpose for which they were created. No function of such banks is destroyed or hampered by allowing the banks to exercise the power to take real estate, provided only they do so under the same conditions and restrictions to which all the other citizens of the state are subjected, one of which limitations arises from the provisions of the state law which, in case of insolvency, seeks to forbid preferences between creditors. Of course, in the broadest sense, any limitation by a state on the making of contracts is a restraint upon the power of a national bank within the state to make such contracts; but the question which we determine is whether it is such a regulation as violates the act of Congress. **As well might it be contended that any contract**

made by a national bank within a state, in violation of the state laws on the subject of minority or coverture, was valid because state laws were in conflict with the act of Congress, or impaired the power of the bank to perform its functions.''

While sovereignties may not be sued, unauthorized acts of state or federal officials can nevertheless be restrained at the instance of mere individuals.

The following cases seem to make this proposition clear.

In Osborn v. United States Bank, 9 Wheat. 737, it was held that the bank, while it could not sue the State of Ohio because of the Eleventh Amendment to the Constitution of the United States, could sue Ohio's Auditor and require him to restore $98,000 collected without authority, because the Ohio law he was acting under was unconstitutional.

In Ex Parte Young, 209 U. S. 123, a railroad filed suit to enjoin the Attorney-General of the state from enforcing the state law. In defense of the action it was pointed out that the Eleventh Amendment to the Federal Constitution provided that no suit could be brought against a state and that no suit on that account could be brought against the officers of the state acting under the authority of the state. In answer to this contention it was urged that the state law, the enforcement of which was sought to be en-

joined was, in fact, a nullity because violative of the Federal Constitution. This Court held that the Attorney-General of the state, notwithstanding the Eleventh Amendment to the Constitution prohibiting suits against the state and against officers of the state, could be enjoined from enforcing an unconstitutional and illegal state statute, and at **page 159** said:

> "The answer to all this is the same as made in every case where an official claims to be acting under the authority of the state. The act to be enforced is alleged to be unconstitutional; and if it be so, **the use of the name of the state to enforce an unconstitutional act to the injury of complainants is a proceeding without the authority of, and one which does not affect the state in its sovereign or governmental capacity. It is simply an illegal act upon the part of a state official in attempting, by the use of the name of the state, to enforce a legislative enactment which is void because unconstitutional.**"

Missouri follows Ex parte Young.

In **Merchants Exchange of St. Louis v. Knott, 212 Mo. 616,** Judge Lamm, **at page 647, l. c.,** said:

> "Finally, it is argued that defendants, as members and employes of the State Board of Railroad and Warehouse Commissioners, are in effect the State of Missouri; therefore, this suit, to all intents and purposes, is against the state, and as a sovereign state cannot be sued by its citizens, the plaintiffs must be cast. We shall

not enter upon the discussion of that theory. That the sovereign state may not be sued is a truism. It was the proud boast of Louis XIV that: 'I am the State.' But defendants are scarcely entitled to the protection of that imperial dogma in this case. They are mere plain ministerial officers, charged to be about to do irreparable injury to the business interests of their fellow-citizens by unlawful acts. As such ministerial officers, so charged, they are not beyond the strong arm of a court of equity.

"The highest court in the land has so lately held this matter in judgment and decided it against the contention of the learned Attorney-General (Ex parte Young, Petitioner, decided March 23rd, 1908, by the Supreme Court of the United States, and reported in 28 Sup. Ct. Rep. 441), that it would be supererogation to prolong this opinion otherwise than by announcing our conclusion that the point is ruled against defendants."

And in **Carson v. Sullivan, 223 S. W. 571,** the Supreme Court of Missouri, en banc, held:

"It is not to be understood from these cases that the state itself can be enjoined, but when its officers act in an unconstitutional or illegal manner, they are not to be regarded as acting for the state, and they may be enjoined. Ex parte Young, 209 U. S. 123; Smith v. Ames, 169 U. S. 466; 22 Cyc 881, paragraph b."

It therefore appears that, while a suit may not be brought (because of the Eleventh Amendment to the Constitution) against a state or officials of a state acting under and pursuant to legal authority, suit may be brought against state officials even by individuals to keep them from attempting to enforce unconstitutional or illegal enactments, for the reason that such enactments are without authority and, therefore, such officials cannot be acting as such in attempting to enforce them.

The same rule applies in restraining federal officials from enforcing federal unconstitutional enactments. Such officials in enforcing or attempting to enforce such enactments are not regarded as officials acting within the scope of their authority, or as officials at all, and so suits against them to restrain the enforcement of unauthorized acts are not regarded as suits against the United States.

It is settled beyond all question that federal officials and federal agencies, like state officials and state agencies, are not such officials or such agencies when they are about to enforce acts passed by Congress without constitutional authority or against constitutional prohibitions, because such acts, being unconstitutional and therefore unauthorized, officials are not acting as such when about to enforce them.

The following cases demonstrate this:

In **Wilson v. New, 243 U. S. 332,** the Receivers of a railroad enjoined the United States District Attorney for the Western District of Missouri from enforcing the Adamson Act, on the allegation that such act was without constitutional authority.

In **Hammer v. Dagenhart, 247 U. S. 251,** individuals enjoined the United States Attorney for the Western District of North Carolina from enforcing the National Child Labor Act, the allegation being that the Child Labor Act was unconstitutional and, therefore, a nullity.

In **Griesedieck Bros. Brewery Co. v. Moore, Internal Revenue Collector, 262 Fed. 582,** a brewery company enjoined the Collector of Revenue from enforcing or attempting to enforce the National Prohibition Act, approved October 28, 1919. The Court thus sums up the law on this proposition. We quote the Court opinion by Pollock, District Judge, in full:

> "(1.2) Coming, now, first to a consideration of the separate motions of defendants filed against the complainants to dismiss the same for want of jurisdiction, it may be said:
>
> "It is perfectly obvious this Court has jurisdiction to hear and determine the question raised as to the constitutional validity of the provisions of the act of Congress challenged, for such issue

is a judicial, and not a legislative, question; and on the decision of this one issue depend all others in this case; for, if the act in so far as challenged be within the constitutional power of the Congress to enact into law, the complainants, and all others, including the defendants, must obey and enforce its terms. **On the contrary, if the provisions of the act challenged by complainants are found and decreed as a matter of law to lie without and beyond the constitutional power of the Congress to enact into law, then the act is not a law. It has no office to perform, has no binding force or effect upon any citizen of the republic, and defendants, in enforcing it, or in attempting or threatening to enforce its provisions against complainants or their property and property rights, to their irreparable loss, injury and damage, are not officers of the law, acting within the scope of their lawful authority, but are, when so engaged, mere private individuals, volunteers and intermeddlers, whose injurious acts ought to and in justice should be restrained.** To such extent and end go all the authorities on the subject (Osborn v. United States Bank, 9 Wheat. 737, 6 L. Ed. 204; Dobbins v. Los Angeles, 195 U. S. 223, 25 Sup. Ct. 18, 49 L. Ed. 169; Ex Parte Young, 209 U. S. 123, 28 Sup. Ct. 441, 52 L. Ed. 714, 13 L. R. A. [n. s.] 932, 14 Ann. Cas. 764; Wes. Un. Tel. Co. v. Andrews, 216 U. S. 165, 30 Sup. Ct. 286, 54 L. Ed. 430; Herndon v. Chi., Rock Island & Pac. Ry., 218 U. S. 135, 30 Sup. Ct. 633, 54 L. Ed. 970; Philadelphia Co. v. Stimson, 223 U. S. 605, 32 Sup.

Ct. 340, 56 L. Ed. 570; Truax v. Raich, 239 U. S. 33, 36 Sup. Ct. 7, 60 L. Ed. 131, L. A. R. 1916D 545, Ann. Cas. 1917B 283; **Wilson v. New, 243** U. S. 332, 37 Sup. Ct. 298, 61 L. Ed. 755, L. A. R. 1917E 938, Ann. Cas. 1918A 1024; Hammer v. Dagenhart, 247 U. S. 251, 38 Sup. Ct. 529, 62 L. Ed. 1101, Ann. Cas. 1918E 724; Jacob Hoffman Brewing Co. v. McElligott, 259 Fed. 525, ... C. C. A. ...; Scatena et al. v. Caffey and Edwards [Southern District of New York, August 20, 1919], 260 Fed. 756).

"The Court has jurisdiction to consider and determine the constitutional validity of the act in question. If valid the Court must so declare, and being valid, the law must be obeyed. If void for want of constitutional power, the courts to which that question is lawfully submitted must so declare; and if such result be decreed, neither the government, the defendants herein, nor any right-minded citizen will desire its enforcement, and the courts to which this question is lawfully submitted can neither decline nor escape decision of the question raised."

In **Kennington v. A. Mitchell Palmer, Attorney-General of the United States, 255 U. S. 100,** injunction jurisdiction against the Attorney-General of the United States was recognized to keep him from enforcing the provisions of the Lever Act of Congress on the ground that it was unconstitutional and, therefore, a nullity. To the same effect is **Tedrow,**

United States District Attorney, v. Lewis & Sons Dry Goods Co., 255 U. S. 98.

Finally is the case of the **State of Missouri v. Holland, United States Game Warden, 252 U. S. 416,** in which the right of Missouri was recognized to enjoin a United States game warden from enforcing the migratory bird law if such law be unconstitutional.

The foregoing suits challenged the legality or constitutionality of statutory enactments, asserting they were void and that the enforcement of them should therefore be restrained.

The instant case presents no challenge as to the legality or constitutionality of any act of Congress; it simply asserts the usurpation of a right or privilege which has never been established or recognized by Congress or by the State of Missouri. It has not even the color of an unconstitutional law to sustain it. **It is wholly without authority and is prohibited.**

How can it, therefore, be said that Missouri, with power to stay the hand of the officials of the federal government in the enforcement of direct legislation alleged to be without constitutional authority, is helpless to stay the aggressions and usurpations of a national banking organization doing business in Missouri when the act complained of is nothing more

than a usurpation of a right clearly withheld from and not granted to it by any law.

This bank, in engaging in branch banking, is not engaged as a national bank, but as one outside the law.

If federal officials and agencies are not above the restraining hand of the state to stop them from enforcing unauthorized legislative acts, it is clear the bank, though a national bank and as such, when acting within its authority, an agent of the government, is likewise not beyond the restraining hand of Missouri when it engages and is about to engage in acts it as a national bank has no authority to engage in, acts in addition prohibited by both nation and state. Such acts are not acts within the law. They are acts of outlawry against the nation and Missouri, which either the nation or Missouri may rightfully stop where, as here, Missouri acts in accord and not in conflict with the laws, aims and purposes of the nation. And in this connection it will be particularly noted that the uusurpation complained of and sought to be suppressed is in violation of both the federal and state law.

We especially urge the consideration of the Court of the following three cases which consider legislative enactments of states that were in accord and

were not in conflict with federal enactments and on that account upheld the state legislative action:

> Gilbert v. Minnesota, 254 U. S., 325-329-332;
> Halter v. Nebraska, 205 U. S. 34;
> Hale v. Henkle, 201 U. S. 43, 75.

It would appear that a sovereign state has the power to stop branch banking usurpation against federal and state law defiantly carried on within its borders.

Notwithstanding, the bank contended at the argument in the Missouri Supreme Court that it could do anything in the State of Missouri, no matter how wrong, without being subject to any restraint from the State of Missouri. If this position of respondent were true, it could tomorrow take possession of the office of the Treasurer of the State of Missouri, take charge of all the state's funds, and unless the Government of the United States would act Missouri would be powerless to remove the bank from the Treasurer's office, and from its control of the public funds; and if the United States never acted, what would become of the sovereign power of the state to protect itself? Would not Missouri thus be compelled to stand with uplifted hands, helpless under threats of an outlaw? We submit with all respect that such contention is absurd.

The contention made by the bank in this court now is not quite so farreaching. The bank contends that if Congress could have granted the bank the right to engage in branch banking that such ability to grant, so far as the state is concerned, is the same as though the bank had been by Congress granted such power. As the bank in its brief puts it, the bank's "grantable" powers can in no way be interfered with by the state (Brief, pp. 37, 49).

Equally untenable is this contention.

Congress in its wisdom grants a national bank certain powers. This means, according to the bank, that the bank can exercise all the powers Congress could constitutionally grant but did not grant, and this creature of Congress unless restrained by the Comptroller, could exercise the ungranted "grantable" powers in a state without let or hindrance from the state.

On page 49 of the brief of plaintiff in error it is said:

> "As well may it be said that the state might complain, if the postmaster at St. Louis established a branch post office at a place where the State thought there should be none; or if the Collector of Internal Revenue for the district did likewise for the better accommodation of taxpayers."

The answer is plain. If the branch in such instances was authorized by the National Government the state could not and would not complain.

If it was not authorized it would probably not complain then even if the postmaster were using his own money to establish the branch, which probably would not occur. The state would not be particularly hurt by such a branch, but if anything, would probably be benefited.

In the case at bar, on the contrary, the establishment of branch banks works unquestioned injury against the state and its banking system besides being directly opposed to its policy and laws.

The bank, be it remembered, is not, in the case at bar, being interfered with in any of its legitimate operations. No burden is being cast on it. It is the one casting burdens. The proposition of the bank is, as we understand it, in brief, this: That a national bank, though without authority, though not granted any power to do the thing it is doing, may nevertheless do that thing if Congress could, though it did not, grant it the power to do that thing. In other words, this contention amounts to this, that under the dual plan of government under which we live Congress, by creating a creature with powers to do certain things, thereby gives that creature not only power to do the things it grants it the right to do, but

in addition grants it all the powers it had the power to grant such creature, and that such creature, in exercising such ungranted "grantable" powers, is free from interference by the state in which such ungranted powers are exercised, and may continue to exercise them and may be stopped only from exercising them at the instance of some official of the Government of the United States. The bank has cited no authorities for this theory, and we believe none can be furnished to support it. If this doctrine be true, a national bank may construct, operate and maintain an interstate railroad, because Congress has the power to grant it not only the authority to operate a national bank, but Congress could, in addition, grant it the further power of engaging in interstate transportation. Under this theory, then, the bank could construct, maintain and operate a railroad in a state and the state would be powerless to prevent the exercise of the "ungranted power" and all incidental powers thereto, and the only relief the state would have in such a contingency would be that some national government official would take action to restrain the bank from exercising the ungranted power of engaging in interstate transportation. If that is the law the state must shortly enter into a complete eclipse to be known no more by man. The "grantable" power theory is not tenable.

At page 50 of the brief for plaintiff in error this statement appears:

> "Are there those who would contend that the general government might attempt to restrain within the supposed limits of the legislative grant corporations created by the state? And if not, what considerations make for the denial of the power in the one case which do not equally apply in the other?"

The answer is clear. If a state corporation acts in the national field, say, of interstate commerce, in violation of the Federal Anti-Trust Law, the state corporation becomes subject to two sovereignties, as Mr. Justice Brown, stating the opinion of the Court, said in the case of Hale v. Henkel, 201 U. S. 43, 75:

> "It is true that the corporation in this case was chartered under the laws of New Jersey, and that it received its franchise from the legislature of that state; but such franchises, so far as they involve questions of interstate commerce, must also be exercised in subordination to the power of Congress to regulate such commerce, and in respect to this the general government may also assert a sovereign authority to ascertain whether such franchises have been exercised in a lawful manner, with due regard to its own laws. Being subject to this dual sovereignty, the general government possesses the same right to see that its own laws are respected as the state would have

> with respect to the special franchises vested in it by the laws of the state. The powers of the general government in this particular in the vindication of its own laws are the same as if the corporation had been created by an act of Congress. It is not intended to intimate, however, that it has a general visitatorial power over state corporations."

Thus it appears that though the National Government is not the creator of the state corporation it has, nevertheless, a right in the nature of a special visitatorial power, as was held in the Hale case, over state corporations to the extent they enter the federal interstate field and violate the laws thereof.

The converse of the situation existing in the Hale case exists in the case at bar.

In the case at bar, a bank is authorized to engage in national banking in the City of St. Louis, Missouri. As to all its authorized operations, the national government has unquestioned exclusive control, to the exclusion of any conflicting state action. The national bank, however, in the case at bar, is not engaged in operations within the bounds of its authority, but its operations are unauthorized activities outside the scope of its power and its authority. Such outside operations are not, of course, national bank operations at all. The nation, of course, has the right to suppress such outlaw operations.

Such outlaw operations in the case at bar happen to be operations that amount to an unwarranted warfare against the welfare of the state and its banking system, and so the state is also interested to protect itself and its banking system from this wrongful warfare.

Missouri in so acting is acting in the sphere of its sovereignty, of its police powers. To employ the reasoning of Mr. Justice Brown in the Hale case, a dual sovereignty exists when acts of a national bank that are non-national bank in character, and are wholly outside its authority, and are prohibited by both nation and state, are committed in a state and are acts that are highly injurious to the interests of the state.

To paraphrase Mr. Justice Brown with respect to such outlaw acts in the state, "the power of the state in this particular, in the vindication of its own laws, is the same as if the corporation had been created by an act of the state."

In Guthrie v. Harkness, 199 U. S. 148, 159, this Court held a stockholder by mandamus in a state court had a right to have an inspection of the national bank's books, notwithstanding the federal law providing that no such bank "**shall be subject to any visitorial powers other than such as are authorized under this title or are vested in the courts of**

justice," and held if the statute were applicable the right to secure an inspection **vested in the courts of justice.**

And in American Bank v. Federal Reserve Bank, 256 U. S. 350, 359, this Court held the state bank could enjoin the Federal Reserve Bank, though an agency of the government, from unwarranted "warfare upon legitimate creations of the state," namely, state banks.

It appears the State of Missouri in the case at bar clearly had the right to maintain this proceeding against the outlaw operations of the bank.

The national bank as to such outlaw operations stands, and should stand, exactly in the same situation any foreign corporation stands in which commits in the domestic state acts that are wrongful and against the welfare of the state.

The brief, on page 50, proceeds:

> "Under our form of government, it is fundamentally impossible that supreme sovereign power as to the same subject matter may rest both in the national government and that of the state."

Take prohibition, for example. The federal law forbids. The state law forbids. The state law, if it be in furtherance and not in conflict with the national law, is upheld, and both laws, of course, forbid the

same thing. While the national power over the subject is supreme, it is not exclusive. The state law is given recognition by the national government as a law in aid and in furtherance of national purposes. The same is true of the national flag case. The national law forbade certain uses of the flag. The state law, in furtherance and in aid of the national purpose, did much the same. Such state law was upheld. The same is true of the Espionage law, a law against speech that would injure the national military cause in the World War. A similar statute of the state in aid and in furtherance of national purposes, was upheld on this vital subject of national power, namely, the army in war. Evidently, therefore, there are fields where the state may act in accord with the nation, when the state acts in furtherance and not in conflict with the objects, aims and purposes of the nation, and that is the case here. The nation, by a policy from 1864 to date has by statutory provision, given no authority to a national bank, to establish branch banks anywhere, and in addition, by statute, forbids their establishment anywhere. The State of Missouri, for the very purpose of bringing its policy and its banking laws as applicable to its state banks, directly in line with the national banking policy, similarly by its law, prohibits branch banking. It is undoubtedly true that the nation could and, through its proper officers, should have acted in this case.

It is equally true, however, that such officers did not act and have not acted, though almost a year has elapsed, but from this it does not follow that the State of Missouri may not suppress, in the interest of the nation and in the interest of the state and the maintenance of its sovereignty, to accomplish the common purpose, this usurpation by this bank.

It appears the right and the duty are equally with the state to suppress the usurpation.

QUO WARRANTO.

Missouri Can Use the Writ of Quo Warranto to Stop Unauthorized and Illegal Operations of the First National Bank Within Its Territory to the Same Extent and Effect as It Can Use It to Stop the Unauthorized, Illegal Operations of Any Foreign Corporation, Especially When Such Operations Are Equally Acts in Defiance of National and State Authority.

When it is conceded that Missouri can stop the carrying on of an unlawful business, or a business not authorized by any law, Missouri can, with full propriety, constitutionally employ any lawful procedure which it may deem most appropriate and convenient to select, so long as it does not deprive the accused of its constitutional rights of due process of law. The decision of the State Supreme Court as to the

form of the remedy is adopted and given full faith by the Supreme Court of the United States on writs of error.

The bank is conducting the business of operating branch banks outside of the law, and by so doing is unlawfully, wrongfully and illegally usurping and exercising a privilege, and when such wrongs are committed by corporations, all must agree that procedure by quo warranto is unquestionably the proper remedy. This Court, in the case of **First National Bank v. Fellows ex rel. Union Trust Co., 244 U. S. 416,** so regarded the matter.

If Missouri were undertaking to forfeit the charter of the bank, the authorities submitted by the bank might be in point, but Missouri is not undertaking to divest the First National Bank of any authority granted to it by law, and therefore is not interfering with its charter powers. This suit refers to matters entirely outside of and beyond the bounds of its charter powers.

> State ex rel. v. Lincoln Trust Co., 144 Mo. 562;
> State ex rel. Att.-Gen. v. Insurance Co., 152 Mo. 1;
> State ex rel. Att.-Gen. v. Armour Packing Co., 173 Mo. 356;
> State ex inf. v. Standard Oil Company, 218 Mo. 1;
> Standard Oil Co. v. Missouri ex rel. Hadley, 224 U. S. 270.

In the case of Standard Oil Company v. Missouri, 224 U. S. 270, the Supreme Court of the United States held that the Supreme Court of Missouri, by virtue of its constitutional authority, had the right to entertain proceedings in quo warranto to oust foreign corporations from transacting business in the State of Missouri contrary to its laws. In speaking of the Supreme Court of Missouri, this Court held:

> "Its decision and judgment necessarily imply that under that clause of the constitution it had jurisdiction of the subject matter and authority to enter judgment of ouster and fine in civil quo warranto proceedings. That ruling is conclusive upon us, regardless of whether the judgment is civil or criminal, or both combined."

In other words, the State of Missouri possesses the right to employ any remedy accessible to it and recognized by its courts as essentially proper to cure the evil complained of or to redress the wrong committed.

In the above case of Standard Oil Co. v. Missouri ex rel., the Supreme Court of the United States also held that as to quo warranto proceedings of the character there involved, there was no denial of due process of law under the Fourteenth Amendment to the Constitution, and that:

> "Due process requires that the court which assumes to determine the rights of the parties

shall have jurisdiction and that there shall be notice and opportunity for hearing given the parties. Subject to these two fundamental conditions which seem to be universally prescribed in all systems of law established by civilized countries, this court has, up to this time, sustained all state laws, statutory or judicially declared, regulating procedure, evidence and methods of trial, and held them to be consistent with due process of law."

The Bank Is Subject to Suit in the State Court.

The Attorney-General of Missouri, having, by virtue of his office, the right to institute this suit, has, as is clearly shown by the decision of the Supreme Court of the United States in the Fellows case (244 U. S. 416), not only relied upon his constitutional and common-law right to file the same in the Missouri Supreme Court, but has accepted the invitation of the Federal Government through the Acts of Congress bestowing upon state courts jurisdiction over suits against national banks. To hold that the Missouri Supreme Court was without jurisdiction in the case at bar would be in total disregard of the provisions of the federal statutes giving the Court jurisdistion. This is practically admitted by the bank (bank brief, pp. 52, 53).

Jurisdiction exists in the state court with the right of appeal to the Supreme Court of the United States.

All harsh and destructive conflicts regarding the rights of the respective states in the exercise of their sovereign power as against the authority of the United States delegated to its respective legislative and judicial departments by the Constitution of the United States are thus in all things successfully avoided and, too, in a most orderly way.

Independent of any statute of the United States conferring jurisdiction of state courts upon national banks, the Missouri Supreme Court, by virtue of its power representing the sovereign rights of the people of the State of Missouri, is clothed with ample jurisdiction to entertain any challenge made by the sovereignty of the state against any corporation, person or association seeking to transcend the law common to both the state and the United States.

The Currency Act of July 12, 1882, Chap. 290, Sec. 4, U. S. Compiled Statutes 1916, section 9668, provides:

> "That the jurisdiction for suits hereafter brought by or against any association established under any law providing for national banking associations, except suits between them and the United States, or its officers and agents, **shall be the same as, and not other than,** the jurisdiction for suits by or against banks not organized under any law of the United States which do or might do banking business where such national banking

association may be doing business when such suit may be begun; and all laws and parts of laws of the United States inconsistent with this proviso be and the same are hereby repealed."

The sixteenth subdivision of **Section 24 of the Judicial Code** of the United States provides that while the District Court has original jurisdiction

> "of all cases commenced by the United States, or by direction of any officer thereof, against any national banking association, and cases for winding up the affairs of any such bank, and of all suits brought by any banking association established in the district for which the court is held, under the provisions of title 'National Banks,' Revised Statutes, to enjoin the Comptroller of the Currency, or any receiver acting under its direction, as provided by said title";

it also provides that:

> "All national banking associations established under the laws of the United States shall, for the purpose of all other actions by or against them, real, personal or mixed, and all suits in equity, be deemed citizens of the state in which they are respectively located."

U. S. R. S., Sec. 5136 (U. S. Comp. Stat. 1916, Sec. 9661) provides that national banks shall have power:

"Fourth. To sue and be sued, complain and defend, in any court of law and equity as fully as natural persons."

From the foregoing it will be observed that state courts have general jurisdiction over national banks. From this we must necessarily conclude that this case was entertainable by the Missouri Supreme Court, regardless of the character of the question involved, so long as it does not fall within the special inhibition of being a suit between a national bank and the United States or between a national bank and officers and agents of the United States.

In the case of **Hermann v. Edwards, 238 U. S. 107,** the Supreme Court of the United States construed section 24, and particularly subdivision 16 thereof, as that statute now stands, by holding that state courts are possessed of full jurisdiction of all cases of whatsoever character against national banks, except those cases specifically exempted therefrom by said subdivision 16 of said section. Which exceptions are:

"First. All cases commenced by the United States or by the direction of any officers thereof against any national banking association;

"Second. Cases for winding up the affairs of any such bank;

"Third. For all suits brought by any banking association established in the district for which

the court is held to enjoin the Comptroller of the Currency or any receiver acting under his direction."

The instant case does not fall within any of the aforesaid exceptions and, therefore, it must be held that the Supreme Court of Missouri was within its proper jurisdictional grounds in entertaining this proceeding.

Mr. Chief Justice White's exposition of the relation between state and national judicial systems in enforcing federal rights may well be set forth here.

In Minneapolis & St. L. R. Co. v. Bombolis, 241 U. S. 211, 221, 223, a case in which a state court denied that federal rights could be required to be enforced in state courts against the will of the state, he said:

> "Moreover, the proposition is in conflict with an essential principle upon which our dual constitutional system of government rests; that is, that lawful rights of the citizens, whether arising from a legitimate exercise of state or national power, unless excepted by express constitutional limitation or by valid legislation to that effect, are concurrently subject to be enforced in the courts of the state or nation when such rights come within the general scope of the jurisdiction conferred upon such courts by the authority,

state or nation, creating them. This principle was made the basis of the first federal judiciary act, and has prevailed in theory and practice ever since as to rights of every character, whether derived from constitutional grant or legislative enactment, state or national. In fact, this theory and practice is but an expression of the principles underlying the Constitution and which cause the governments and courts of both the nation and the several states not to be strange or foreign to each other in the broad sense of that word, but to be all courts of a common country, all within the orbit of their lawful authority being charged with the duty to safeguard and enforce the right of every citizen without reference to the particular exercise of governmental power from which the right may have arisen, if only the authority to enforce such right comes generally within the scope of the jurisdiction conferred by the government creating them. And it is a forgetfulness of this truth which doubtless led to the suggestion made in the argument that the ruling in Second Employer's Liability cases (Mondou v. New York, N. H. & H. R. Co.), 223 U. S. 1, 56 L. Ed. 327, 38 L. R. A. (n. s.) 44, 32 Sup. Ct. Rep. 169, 1 N. C. C. A. 875, had overthrown the ancient and settled landmarks and had caused state courts to become courts of the United States exercising a jurisdiction conferred by Congress, whenever the duty was cast upon them to enforce a federal right. It is true in the Mondou case it was held that where the general jurisdiction conferred by

the state law upon a state court embraced otherwise causes of action created by an act of Congress, it would be a violation of duty under the Constitution for the court to refuse to enforce the right arising from the law of the United States, because of conceptions of impolicy or want of wisdom on the part of Congress in having called into play its lawful powers. But that ruling in no sense implied that the duty which was declared to exist on the part of the state court depended upon the conception that, for the purpose of enforcing the right, the state court was to be treated as a federal court, deriving its authority not from the state creating it, but from the United States. On the contrary, the principle upon which the Mondou case rested while not questioning the diverse governmental sources from which state and national courts drew their authority, recognized the unity of the governments, national and state, and the common fealty of all courts, both state and national, to both state and national Constitutions, and the duty resting upon them, when it was within the scope of their authority, to protect and enforce rights lawfully created, without reference to the particular government from whose exercise of lawful power the right arose."

The Supreme Court of Missouri had jurisdiction subject to the right of appeal to this court for ultimate decision.

Counsel for plaintiff in error, on page 83 of their brief, extend the challenge that no good reason has ever been suggested why any bank, state or national, should not have two or more offices or banking houses. We accept the challenge thus stated.

Among the many good reasons in opposition to the right of any bank in this country to have more than one office or place of business we submit the following:

(a) The original United States banks, the first from 1791 to 1811, and the second from 1816 to 1836, each had the right to establish branch banks under direct federal legislation with full regulatory powers in the hands of the government concerning the same. This branch banking system expired with the expiration of the charter of the last of said two banks in 1836, and since that time has never been generally recognized by the Congress.

(b) In 1864 the present banking system of the United States was established by Act of Congress, and branch banking privileges were deliberately omitted from the plan and never became a part thereof.

(c) To force a branch banking system upon a state which has adopted a system prohibiting branch banks will create an unwarranted warfare between the legitimate creations of the state and national

banks, and would in that respect be in derogation of the sovereignty of the state.

(d) The people of the United States, and the people of the State of Missouri since 1864, have been alike in their opposition to branch banks.

(e) At almost every session of Congress within the last thirty years bills have been proposed, at the instance of some monopolistically inclined national bank, authorizing the establishment of branch banks by national banking associations, and such measures have in every instance met with legislative defeat.

(f) From the foregoing it is apparent that the people, generally, and their representatives in their various legislative capacities are opposed to the branch banking system because of the ill effects that would be brought about if they were permitted. It is readily observable that these ill effects would be the stifling of competition, destruction of individual enterprise and initiative, subjection of commercial, industrial and general business interests to the dictates of centralized financial powers, rendering borrowing privileges difficult, and enable a few individuals to dominate the banking and business interests to the detriment of the general good. It would most assuredly have this effect in every city or business community wherein branch banks, offices or agencies or two or more offices of banking houses are permit-

ted to any one bank, whether that bank be of state or national authorization.

(g) National bankers and state bankers and trust companies all recognize the ill effects of branch banking, as shown by the resolution upon this subject adopted by the American Bankers Asssociation at its forty-eighth convention, held in the City of New York October 2nd to 6th, 1922, which resolution as adopted is as follows:

> "Resolved, by the American Bankers Association, that we view with alarm the establishment of branch banking in the United States and the attempt to permit and legalize branch banking; that we hereby express our disapproval of and opposition to branch banks in any form in our nation.
>
> "Resolved, that we regard branch banking or the establishment of additional offices by banks as detrimental to the best interests of the people of the United States. Branch banking is contrary to public policy, violates the basic principles of our government, and concentrates the credit of the nation and the power of money in the hands of a few."
>
> Report of proceedings of forty-eighth annual convention of American Bankers Association, 1922.

The American Bankers Association is composed exclusively of officials of national and state banks

and trust companies. At its session above referred to and at the time designated in its program for the consideration of this identical question there were more than two thousand representative bankers present, coming from all parts of the nation. In fact, this was the largest meeting that organization ever held. May we ask, do counsel for plaintiff in error question the good faith and honest judgment of the members of this association, or assert that the resolution was adopted without good reason?

(h) In addition to the foregoing the bankers' associations of state after state have placed their respective organizations on record in a similar manner against branch banks. Banks and bankers of the country as a rule are against branch banking, as evidenced by their conduct in their respective conventions, and we deem it sufficient to say at this juncture that it will not be contended that these resolutions were adopted in their entirety and so unanimously and uniformly without having some good, substantial reason therefor, acquired through long years of experience in the business.

In conclusion, we submit that the First National Bank had no authority to and was prohibited from engaging in branch banking in St. Louis, Missouri, by the National Bank Act, and that its non-national-

bank act of nevertheless engaging in branch banking in St. Louis was violative of the Missouri law prohibiting branch banks, and that it was the right and duty of Missouri to suppress the usurpation.

The Supreme Court of Missouri having the right to enforce the public policy and statutes of that state, this court is not concerned with the manner in which it was done nor the conclusions arrived at by that court unless such action be in conflict with the national law or purposes as expressed by the government through its congressional action, and a dismissal of the writ of error would be a proper disposition of the case.

However, the Supreme Court of Missouri possessed the right to inquire into the conduct of the bank in that state because of the violation of a federal statute and because of the exercise of a right not granted by federal law, and the judgment of that court should be affirmed.

Because of a well-defined interest in the propositions presented in this case, the State of Missouri has filed no motion herein for a dismissal of the writ of error or pleas that would prevent an early consideration of the case, believing that the public welfare of the state and nation will be better served by going direct to the merits of the proposition involved, to

the end that there may be a final determination of the matter at the earliest convenient time.

Respectfully submitted,

Jesse W. Barrett
....
Attorney-General of Missouri.

Merrill E. Otis
....
Assistant Attorney-General of Missouri.
For Defendant in Error.
(Respondent in Certiorari.)

Sam B. Jeffries
....

Wm. T. Jones
....

H. P. Sneed
....

Marion C. Early
....

Edw. W. Foristel
....
Of Counsel.

APPENDIX A.

Lowry National Bank of Atlanta, Ga.—Establishment of Branch Office.

29 Opinions of Attorneys-General (U. S.) 81.

A national bank, independently of Section 5190, Revised Statutes, is not, under its charter, authorized to establish a branch bank or co-ordinate office for the purpose of carrying on a general banking business in the place designated in its certificate of organization.

Section 5190, Revised Statutes, properly construed, restricts the carrying on of the general banking business by a national bank to one office or banking house in the place designated in the association's certificate of organization.

DEPARTMENT OF JUSTICE,
WASHINGTON,

May 11, 1911.

The Honorable,
The Secretary of the Treasury.

Sir:

I have the honor to acknowledge receipt of your communication of January 3, 1911, in which you say that the Lowry National Bank of Atlanta, Georgia, desires to establish another office or banking house in that city, and has requested the Comptroller of the Currency to state whether any objection will be made to such action, and you ask my opinion with reference to the right of a national bank to establish an additional or branch office or banking house in the place designated in its certificate of organization.

I have given the question consideration commensurate with its great importance and with the earnestness and ability with which it has been presented in briefs and arguments submitted on behalf of the bank, and will assign at some length the reasons for the conclusions which I have reached.

Whatever may be the English rule with reference to the power of the **stockholders** of a corporation to make a contract which will bind the corporation, when the power to make such contract is not prohibited, although not granted either expressly or by implication in its charter (**Riche v. The Ashbury Railway &c Co.**, Law Rep. 9 Ex. Cas. 224, 227), the American rule defining the powers that may be exercised by a corporation is well settled, and was thus stated by the Supreme Court of the United States in **Green Bay & Minn. Railroad Co. v. Union Steamboat Co.**, 107 U. S. 98, 100:

> "The general doctrine upon this subject is now well settled. The charter of a corporation, read in connection with the general laws applicable to it, is the measure of its powers, and a contract manifestly beyond those powers will not sustain an action against the corporation. But whatever, under the charter and other general laws, reasonably construed, may fairly be regarded as incidental to the objects for which the corporation is created, is not to be taken as prohibited."

The principle is also well stated in **People v. Pullman Palace Car Co.**, 175 Ill. 125, 136, as follows:

> "The enactment creating the appellee corporation is the full measure of its power. In order to enable it to carry into execution the powers

thus conferred it may exercise other powers known to the law as incidental or implied powers. Implied powers exist only to enable a corporation to carry out the express powers granted —that is, to accomplish the purpose of its existence—and can in no case avail to enlarge the express powers and thereby warrant it to devote its efforts and capital to other purposes than such as its charter expressly authorizes, or to engage in collateral enterprises not directly, but only remotely, connected with its specific corporate purposes. A power which the law will regard as existing by implication must be one in a sense necessary—that is, needful, suitable and proper to accomplish the object of the grant, and one that is directly and immediately appropriate to the execution of the specific powers, and not one that has but a slight, indirect or remote relation to the specific purposes of the corporation."

Although it has been said that

> " 'A corporation, in order to attain its legitimate objects, may deal precisely as an individual may who seeks to accomplish the same end (**Barry v. Merchants Exchange Co.**, 1 Sandf. Ch. [N. Y.] 280, 289)' ";

yet manifestly a corporation organized to engage in a certain business cannot do everything that can be done by a natural person engaged in a like business. The rights and powers of a natural person to enter into all kinds of contracts and to transact all character of business, are inherent; and any limitations upon that power must be found in some law restricting such rights; and hence, acts may be performed by

a natural person which only remotely or indirectly affect a business in which he is engaged, and are not necessary, needful or immediately appropriate to the transaction of the business, and which, if done by a corporation engaged in such business, would be ultra vires.

The fundamental principle here stated has been applied by some courts and textbook writers in connection with the establishment by banks of agencies for the transaction of a particular business, and also branches for the transaction of a general banking business; and it is well to review these authorities before applying the principle to national banks.

The leading case with reference to the power of a bank to transact a particular kind of business through an agency is **Bank of Augusta v. Earle,** 13 Pet. 519. The Bank of Augusta was incorporated by a special act of the Legislature of Georgia; and the corporation was given the general power to deal in bills of exchange. The principal office of the corporation was located in Augusta, Georgia, but an agency was maintained in Mobile, Alabama, for the purpose of trafficking in exchange. In the due course of business a bill of exchange drawn by a firm in Mobile on a firm in New York City in favor of the defendant Earle, accepted by the drawee and endorsed by the payee, was discounted by the Mobile agency with funds placed there for that purpose. The bill was protested for nonpayment and returned to the Bank of Augusta, whereupon suit was brought against Earle. The Circuit Court dismissed the suit upon the ground that the Bank of Augusta was without authority to make a contract in the State of Ala-

bama. On appeal this judgment was reversed by the Supreme Court, the main question there discussed and determined being whether a corporation had the power to make a contract outside of the state which had granted its charter. Upon this question the Court said:

> "The charter of the Bank of Augusta authorizes it, in general terms, to deal in bills of exchange and, consequently, gives it the power to purchase foreign bills as well as inland; in other words, to purchase bills payable in another state. The power thus given clothed the corporation with the right to make contracts out of the state, in so far as Georgia could confer it. For, whenever it purchased a foreign bill and forwarded it to an agent to present for acceptance, if it was honored by the drawee the contract of acceptance was necessarily made in another state; and the general power to purchase bills, without any restriction as to place, by its fair and natural import, authorized the bank to make such purchases wherever it was found most convenient and profitable to the institution; and also to employ suitable agents for that purpose. The purchase of the bill in question was, therefore, the exercise of one of the powers which the bank possessed under its charter; and was sanctioned by the law of Georgia creating the corporation, so far as that state could authorize a corporation to exercise its powers beyond the limits of its own jurisdiction" (pp. 587-588).

And, again:

> "The corporation must, no doubt, show that the law of its creation gave it authority to make

such contracts through such agents. Yet, as in the case of a natural person, it is not necessary that it should actually exist in the sovereignty in which the contract is made. It is sufficient that its existence as an artificial person, in the state of its creation, is acknowledged and recognized by the law of the nation where the dealing takes place; and that it is permitted, by the laws of that place, to exercise there the powers with which it is endowed" (p. 589).

In **Tombigbee Railroad Co. v. Kneeland**, 4 How. 16, a Mississippi corporation vested with banking powers brought an action on a promissory note discounted at the branch office of plaintiff in Gainesville, Alabama. The act of the Legislature incorporating this company provided that it could establish branches when the directors deemed it expedient, at such places as might be designated by the Legislature. It does not appear, however, whether Gainesville had been designated as such place, but the case was made to turn entirely upon the authority of **Bank of Augusta v. Earle**, it being held that the transaction in question was authorized by the company's charter, and was valid, though the transaction was had in the State of Alabama.

City Bank of Columbus v. Beech, Fed. Case No. 2736, was an action brought to recover the amount of two bills of exchange discounted at an agency maintained in Cleveland, Ohio, by the City Bank of Columbus. The bank was incorporated under the laws of Ohio, and was vested with express power to buy, sell and discount bills of exchange, and it maintained the agency at Cleveland for the purpose of

dealing in bills of exchange. In passing upon the legality of such agency, Circuit Judge Nelson said:

> "The acts under which the bank became a corporation conferred upon it the power to deal in exchange, without restriction, and hence the purchase of bills at the City of Cleveland, for the purpose of remitting the proceeds of paper belonging to the bank collected at that place, or even the dealing generally in exchange at that place by an agent, with the funds thus collected and remitted, was not in contravention of the charter of the bank, or of any law of the State of Ohio. I think this case falls within the principle of the case of Bank of Augusta v. Earle, 13 Pet. (38 U. S.) 519, and of Tombigbee R. Co. v. Kneeland, 4 How. (45 U. S.) 16, and that a new trial ought not to be granted."

And District Judge Conkling thus stated the question presented:

> "The question, then, is resolved into the simple inquiry whether a state bank, having power by its charter to deal in bills of exchange, without any express restriction as to place, can lawfully establish an agency for the purpose of buying and selling bills of exchange, in a part of the state other than that of its location";

and the question was answered by the learned Judge in the affirmative.

Many cases might also be cited wherein it has been held that banking corporations have the power to establish clearing house agencies.

These authorities are conclusive of the proposition that a bank may maintain an agency, the power of which is restricted to dealing in bills of exchange, or

possibly to some other particular class of business incident to the banking business. But, are they authority for the proposition that a bank may establish a branch for the transaction of a general banking business?

In none of the cases cited has it been suggested that the principle declared can be extended to include such a power. On the other hand, the case of **People v. Oakland County Bank,** 1 Douglas 282, 288, decided by the Supreme Court of Michigan, is clearly to the contrary. The Oakland County Bank was organized under a special act of the Legislature, and the only reference therein to its place of business was, that the parties mentioned might receive subscriptions to the capital stock of a bank to be located at such place **in the County of Oakland** as the majority of the stockholders might direct; and, again, upon the paying in of twenty thousand dollars of the capital stock of the bank, the commissioners or directors should procure a convenient place **in said County of Oakland** and commence operations. There was no **prohibition** in the act against the bank doing business anywhere in the state, or against its establishing a branch. However, the bank did establish a branch in Detroit, in which was carried on a regular banking business, and the action was brought to revoke the charter of the bank because of the maintenance of this branch. The Court held that the corporation was wholly without authority to establish the branch, saying:

> "By the act of incorporation, the stockholders were authorized to locate the bank in the County of Oakland. It follows, therefore, that if the corporation has undertaken to exercise any of its

franchises without that county, it has usurped an authority in violation of law and must suffer the penalty which that law inflicts."

In **Bank of Augusta v. Earle** it was held that, though the Legislature of the State of Georgia did not undertake to authorize the corporation to do a banking business outside of that state, yet the bank could transact a **particular business** in the State of Alabama through an agency; while in the **Oakland County Bank** case it was held that under a like limitation in its charter powers the establishment of a branch wherein a general banking business was carried on was unauthorized and unlawful.

If, in the former case, a branch bank had been established in Mobile for the purpose of conducting a general banking business instead of a mere agency for the purchase of bills of exchange there is nothing in the opinion of the Supreme Court to indicate that, in a direct attack upon such institution, it would have been held as authorized by the bank's charter; while, in the latter case, if a mere agency for the purchase of bills of exchange had been established in Detroit the Supreme Court of Michigan would, in all probability, have sustained the validity of its transactions.

These cases clearly indicate that the courts recognize a vital distinction between a mere agency for the transaction of a particular business and a branch bank wherein is carried on a general banking business.

That such a distinction does exist, in fact, is obvious.

An agency requires no division of the capital stock, and the details of the business are few and are easily

supervised by the officers of the bank, while a branch bank requires, in effect, a division of the capital, the working force is organized, and the business conducted as if it were a separate organization, and it competes in all branches of the banking business with other banks in that locality the same as if it were an independent institution.

That the authorities sustaining the validity of transactions by an agency do not apply to the establishment of a branch bank is further shown by the following authorities, wherein it is expressly declared that a bank cannot establish a branch unless the power to do so is granted by its charter or the general laws relating to the subject, in express language or by necessary implication.

In Morse on Banks and Banking, section 46, it is said:

> "Agencies for specific purposes, as for the redemption of bills or the dealing in bills of exchange, may be established in other places. In these cases it is for the convenience of the public that such should be the case. But there is no case which holds that an agency for the exercise of the more important and valuable functions, such as issuing circulating paper or discounting notes, or an agency designed to carry on the general business of banking, would be regarded as legal. For such nominal establishment of agencies might easily result in the practical establishment of a network of branch banks throughout the home state or in other states."

In 1 Morawetz on Corporations, sec. 387, it is said:

> "Banking corporations have implied authority to create agencies for special purposes, such as

the redemption and purchase of bills of exchange and other securities, wherever this may be advantageous in carrying on their business, but they have no right to establish branch banks in the absence of express authority conferred by charter. When a banking corporation is created to do business at some particular place, it is implied that its banking house shall be established at that place only, and that its affairs shall be managed by a single set of officers, in the usual manner."

Magee on Banks and Banking, sec. 30, says:

"The question of privilege in the establishment of a branch bank seems to be settled that a national bank has no right to establish branch banks without special legislative authority. The ruling is upon the principle, no doubt, that the bank must have a location or place where all its business is to be transacted, and branches, especially if established outside of the city or town and at a place other than the location of the mother bank, would lead to conflict as to where notes should be protested and payments to be made."

In Zane on Banks and Banking, sec. 24, it is said:

"If private banking is permitted, there is no reason, in the absence of legal prohibition, why a private bank should not have branches, but a corporation has only the powers granted it, and it cannot establish branches unless the power to do so is granted to it."

In **Morehead Banking Co. v. Tate**, 122 N. Car. 313, 316, the charter of the bank provided that "its princi-

pal place of business shall be at Durham, North Carolina," but did not, in express terms, permit the establishment of branch banks. However, the bank established a branch at Burlington, North Carolina, and the cashier at this branch executed a bond for the faithful performance of his duties, and the action was brought to recover for a breach of the bond. The Court held that the defendant was not in a position to question the right of the bank to locate a branch at Burlington; but, in response to the contention that the expression in the charter that the "**principal** place of business shall be at Durham" by implication authorized the establishment of a branch bank or agency at another point, the Court said:

> "This court would not be willing to sanction this practice of establishing branch banks or agencies to do a banking business unless they are **expressly** (bold-face type the court's) authorized by legislative authority contained in the charter. And any bank without having this express grant undertaking to establish such branch establishments will lay itself liable to have its charter vacated."

In **Bruner v. Citizens Bank of Shelbyville**, 134 Ky. 283, 298, the power of a bank to establish a branch, when not expressly authorized to do so by its charter, was very fully and ably considered; and, after enumerating many reasons why such authority should not be implied, unless such implication necessarily arose from the language used, the Court concluded its opinion as follows:

> "Other reasons might be advanced against granting the powers contended for, but we con-

sider these sufficient to support the conclusion we have reached that, in the absence of express legislative authority, the power to establish branch banks does not follow by implication as a reasonable or necessary incident to the right to do a banking business. This construction does not mean that banks may not have agents. There is a wide difference between the appointment of agents to receive and collect money and forward it to the bank or to transact other business necessary or incidental to banking and the right to establish branch banks at which a general banking business is carried on. A bank may have as many duly appointed agents as its needs require, and these agents, among other things, may receive and forward to it at its place of business the money of persons who desire to deposit with it. We believe that safe and conservative banking methods, the protection of the public, the security of depositors, and the interests of the stockholders all demand that banks shall have only one place at which to 'carry on the business of banking and discounting and negotiating notes, drafts, bills of exchange and other evidences of debt, and purchasing bonds, receiving deposits and allowing interest thereon, buying and selling exchange, coin and bullion and lending money on personal or real security.' And that to legalize by judicial construction a departure from this course would soon result in failure that would do infinite harm to the banking interests of the state and bring disaster to numbers of innocent people."

My attention has been called to no case or textbook wherein the principle has been stated with approval that a bank has the power to establish a branch for the carrying on of a general banking business, un-

less such power is granted either in its charter or by general statute in express language or by necessary implication; and, in view of the authorities above cited, it should be considered as settled that no such power otherwise exists.

With this principle in mind, let us examine the laws pertaining to the establishment and control of national banks and determine whether any such power is therein granted, either expressly or by implication.

The general powers granted to national banks are contained in Section 5136, Revised Statutes, paragraphs 6 and 7. In paragraph 6 the association is given power to prescribe, by its board of directors, by-laws not inconsistent with law, regulating the manner in which its general business shall be conducted and the privileges granted to it by law exercised and enjoyed; and by paragraph 7 it is empowered

> "to exercise by its board of directors or duly authorized officers or agents, subject to law, all such incidental powers as shall be necessary to carry on the business of banking, **by discounting and negotiating promissory notes, drafts, bills of exchange and other evidences of debt; by receiving deposits, buying and selling exchange, coin and bullion; by loaning money on personal security, and by obtaining, issuing and circulating notes, according to the provisions of this title.**"

Clearly, neither of these provisions contain an express or **necessarily** implied power to establish a branch bank. The former relates to the adoption of by-laws by the board of directors prescribing the manner of conducting the business of the institution;

while the latter confers the power to carry on the business of banking by the exercise of the particular powers enumerated therein. While these powers are designated as incidental, yet undoubtedly all powers are also granted which are reasonably necessary for the exercise of each and every one of these enumerated powers.

As said in **First National Bank v. National Exchange Bank,** 92 U. S. 122, 127, in referring to Section 5136, Revised Statutes:

> "Authority is thus given to transact such a banking business as is specified, and all incidental powers necessary to carry it on are granted. These powers are such as are required to meet all the legitimate demands of the authorized business and to enable a bank to conduct its affairs, within the general scope of its charter, safely and prudently."

Yet, the power to establish a branch bank is certainly in no respect essential to the discounting and negotiating of promissory notes, drafts, bills of exchange and other evidences of debt, or of exercising either or any of the incidental powers named in the statute, or of any power which is incident to the carrying on of a general banking business.

The only clauses which relate to the place where a bank may transact business are, first, in Section 5134, Revised Statutes, where it is provided that the certificate of organization shall specify:

> Second. "The **place** where its operations of discount and deposit are to be carried on, designating the state, territory or district, and the particular **county** or **city, town** or **village.**"

And, second, Section 5190, Revised Statutes, which provides that:

> "The usual business of each national banking association shall be transacted at **an** office or banking house, located in the place specified in its organization certificate."

The first of these provisions does not expressly prohibit the carrying on of a general banking business outside of the place designated in the certificate; yet it is agreed that the clear implication therein is that the power of the bank to carry on such a business cannot be exercised elsewhere than in such place; and there is certainly no implication or intimation in this clause that the association may establish an unlimited number of banks or branches within the designated place.

The arguments presented on behalf of the bank have been directed mainly to section 5190; but it has not been even suggested that there is anything in the language of this section which of itself can possibly be construed as an implication that a national bank has the power to establish a branch bank. The sole contention is that this section does not **expressly prohibit** the establishment of a branch.

It may be admitted that there is reasonable ground for this contention and that if there were any provision elsewhere in the national banking laws which clearly implied that such authority existed, by a subtle process of reasoning this section could be construed to be consistent therewith. But, in the absence of such language elsewhere in the act, and in view of the general principle that banks cannot es-

tablish branches unless the power to do so is granted, it appears to me that the natural meaning of this section is that the general banking business of a national bank must be conducted in **one** office or banking house, within the place designated in its organization certificate.

But little light is thrown upon the meaning of this section by the decisions of the courts. In **Merchants Bank v. State Bank**, 10 Wall. 604, 650, it was insisted that the certification of checks by a cashier at another place than his banking house was, under this section, void; but the Court held to the contrary, saying:

> "It is objected that the checks were not certified by the cashier at his banking house. The provisions of the act of Congress as to the place of business of the banks created under it must be construed reasonably. The business of every bank away from its office—frequently large and important—is unavoidably done at the proper place by the cashier in person, or by correspondents or other agents. In the case before us, the gold must necessarily have been bought, if at all, at the buying or the selling bank, or at some third locality. The power to pay was vital to the power to buy, and inseparable from it. There is no force in this objection."

This decision is but in line with **Bank of Augusta v. Earle** and other cases in which it was held that a bank may transact a particular class of business outside its banking house.

In **Armstrong v. Second National Bank of Springfield,** 38 Fed. 883, 886, one question was whether or not a national bank could enter into a general ar-

rangement with a bank at another point to cash its checks, and Judge Sage, upon this point, said:

> "If, now, we turn to Section 5190 of the United States Revised Statutes, we find it enacted that 'the usual business of each national banking association shall be transacted at an office or banking house located in the place specified in its organization certificate.' Under this section it certainly would not be competent for a national bank to provide for the cashing of checks upon it at any other place than at **ITS office** or banking house."

There is some doubt whether this holding of the learned Judge is in accord with the cases above cited which uphold the power of a bank to maintain an agency.

In neither of these cases was the bearing of this section upon the power to establish branch banks before the Court or given any consideration. Hence, so far as the courts are concerned, the precise meaning of this section is an open one; but I think the construction above given the most natural and reasonable.

Section 5138, Revised Statutes, also has an important bearing upon this question. There it is provided that the minimum capital stock of a bank in a place containing from three to six thousand inhabitants shall be not less than $50,000; in a place from six to fifty thousand inhabitants, not less than $100,000, and in all larger places the capital shall be not less than $200,000.

In a branch bank bills of exchange are negotiated and discounted; moneys received for deposit; ex-

change, coin and bullion are bought and sold; money is loaned, and every kind of banking business that is authorized is there transacted, unless it be the issuing and circulating of bank notes. In proportion to the amount of business transacted, the same capital is required to run the branch bank as to operate the parent bank. In the City of Atlanta no national bank can be organized for a less capital than $200,000, and if a national bank in that city, having a capital stock of $200,000, should establish a branch bank therein, the practical result would be that two banks would be in operation on a capital upon which only one bank is authorized to do business in that city, and each additional branch would, of course, constitute a further division of the capital, in violation of the spirit of this section of the statutes.

Furthermore, I have carefully examined the national banking laws, and I fail to find any provision which empowers the Comptroller to restrain or to regulate in any manner the conduct of a national bank with reference to the establishment and maintenance of branch banks. He is authorized and directed to approve of the name assumed by the association (Sec. 5134, Rev. Stats., par. 1); when notified that 50 per cent of the capital stock has been paid in, and the laws have otherwise been complied with, he is required to examine into the condition of the association, the name and place of residence of its directors, the amount of capital stock of which each is the owner in good faith, and whether such association has complied with all the provisions of the act, and shall cause a proper statement to be attested by oath of a majority of its directors and the pres-

ident and cashier; and, if, after such examination, it appears that the association is lawfully entitled to commence the business of banking, it is his duty to issue a proper certificate to that effect (Secs. 5168 and 5169, Rev. Stats.); he is required to approve the increase of capital stock (Act of May 1, 1886, Sec. 1; Sec. 5142, Rev. Stats.); and also the decrease of the capital stock (Sec. 5143, Rev. Stats); he can, at his discretion, extend the corporate existence of the association (Act of July 12, 1882, Sec. 9; 22 Stat. 162); he must approve reserve agents of the association (Secs. 5192 and 5195, Rev. Stats.); he is required to give notice to an association that is short in reserve funds (Sec. 5192, Rev. Stats.); he must approve the change of name and location of a bank (Act of May 1, 1886, Sec. 2; 24 Stat. 18), and shall also approve of the conversion of state banks into national banks (Sec. 5154, Rev. Stats.); but there is no provision directing or authorizing him to exercise any power whatever with reference to the location of a branch bank, or the terms and conditions upon which such a branch may be established and maintained.

Can it be supposed that if Congress intended to authorize the establishment of branches by national banks, no restraint whatever would have been thrown around the exercise of such power, and that the Comptroller, who in all other respects is given such ample power of control over the existence and conduct of banks, would not have been vested with some power or control over the location of such branches, and the manner in which the same should be established and conducted?

If, under the laws as they now exist, a national bank has the power to establish a branch, the exercise of that power is entirely within the discretion of the board of directors of the association, and it may be exercised without any restraint whatever; and the Lowry National Bank can establish, not only one branch in the City of Atlanta, but any number of branches, without consultation with the Comptroller with reference thereto. Such an unrestrained power, it appears to me, would be fraught with the most serious danger, and would result in an inflation of banking business upon insufficient capital, and in an inadequate means of supervision and control over a bank's business by the chief officials in authority, which, in all probability, would bring disaster to the welfare and reputation of the national banking system.

It is quite probable that some national banks, under peculiar circumstances, should be permitted to establish branches, but this should not be done except under the supervision and direction of the Comptroller, who should possess the authority to make careful investigation of all the conditions, and exercise his judgment as to whether the establishment of such branch should be permitted, and to prescribe proper regulations by which it should be conducted.

It is needless to say that such a power can be granted only by Congress, and cannot be vested in the Comptroller by a mere construction of the statute, when the statute contains no clause which will warrant such a construction.

Finally, the construction heretofore placed upon the banking laws, both by Congress and your de-

partment, has been uniformly in accordance with the view that a national bank has not the power to establish a branch bank.

By Section 7 of the Act of March 3, 1865, ch. 78 (13 Stat. 484; Sec. 5155, Revised Statutes), it is provided that:

> "It shall be lawful for any bank or banking association organized under state laws, and having branches, the capital being joint and assigned to and used by the mother bank and branches in definite proportions, to become a national banking association in conformity with existing laws, and to retain and keep in operation its branches, or such one or more of them as it may elect to retain; the amount of circulation redeemable at the mother bank and each branch to be regulated by the amount of capital assigned to and used by each."

If the power existed for national banks to have branches, there was no necessity for this express provision allowing state banks, when converted, to retain their branches; and, moreover, the limitation of this power to such banks as had their capital assigned to the mother and branch banks in definite proportions clearly shows that it was not supposed that such a power was possessed by banks in general.

By Act of May 12, 1892 (27 Stat. 33), any national bank in Chicago designated by the World's Columbian Exposition was, upon approval by the Comptroller, authorized to conduct a banking office upon the exposition grounds, the time within which such branch might be operated being restricted to two years; and a similar act was passed March 3, 1901

(31 Stat. 1444) with reference to the establishment by the banks of St. Louis of branches on the grounds of the Louisiana Purchase Exposition.

Of course, the interpretation of statutes is a judicial function, and the courts may disregard the meaning ascribed to an act in subsequent legislation. But, the construction of an act by Congress, especially by the Congress which enacted it, is always given much consideration, the general rule being thus stated in **United States v. Freeman,** 3 How. 556, 565:

> "If it can be gathered from a subsequent statute, in pari materia, what meaning the legislature attached to words of a former statute, they will amount to a legislative declaration of its meaning, and will govern the construction of the first statute."

The officers of your department who have administered the banking laws have also given a like construction to this section. I have been unable to find any expression made by them with reference to this feature of the banking laws, previous to August 10, 1889. On that date Solicitor Hepburn held, in an opinion rendered at the request of the Comptroller, that under Section 5190, Revised Statutes, a banking association had to transact its usual business in **one** office or banking house. That this construction has been uniformly followed and concurred in is shown by the "Instructions and Suggestions of the Comptroller of the Currency Relating to the Organization, etc., of National Banks," issued in 1909, wherein it is said:

> "The word 'place' and 'at an office or banking house' (as used in section 5190) have always

been construed by the Comptroller to mean the **legal domicile** of the corporation, of which it can have but one" (p. 40).

And, again:

"While the National Bank Act does not, in express terms, prohibit the establishment and maintenance of branch banks or agencies by associations or primary organization, the implication to that effect is clear, and the courts have held that what is implied is as effective as that which is expressed" (p. 42).

On November 15, 1910, this question was submitted to the present solicitor of your department, who, after mature and careful consideration, concurred in the opinion of Solicitor Hepburn.

With this uniform construction of this statute by your department for more than twenty years, and the unmistakable inference that the Congress which passed the act entertained the same view as to its meaning, I would hesitate to express a contrary opinion, if, as an original proposition, I believed the act capable of being so construed, even though the contrary construction were the more reasonable.

However, upon the various considerations above stated, it is my opinion that:

First. Independently of Section 5190, Revised Statutes, a national bank is not, under its charter, authorized to establish a branch or co-ordinate office for the purpose of carrying on a general banking business in the place designated in its certificate of organization, and,

Second. That Section 5190, Revised Statutes, properly construed, restricts the carrying on of the general banking business by a national bank to one office or banking house in the place designated in the association's certificate of organization.

Respectfully,

J. A. Fowler,
Assistant to the Attorney-General.

Approved:
Geo. W. Wickersham,
Attorney-General.
Acknowledged by Mac Veigh, June 2, 1911.

APPENDIX B.

Instructions
of the
Comptroller of the Currency
Relative to the
Organization and Powers of National Banks.
1920.

Page 110.

Chapter 9.

Branch Banks.

112. Domestic Branch Banks.

The only provision in the National Bank Act relating to branch banks is found in Section 5155, United States Revised Statutes, and reads as follows:

> "It shall be lawful for any bank or banking association, organized under state laws and having branches, the capital being joint and assigned to and used by the mother bank and branches in definite proportions, to become a national banking association in conformity with existing laws and to retain and keep in operation its branches, or such one or more of them as it may elect to retain * * *."

The granting of this special privilege to converting state banks and the absence of any similar provision in the law with respect to domestic branches of national banks of primary organization have always been construed by the Comptroller to imply that banks of the latter class were not permitted to have domestic branches. The section cited absolutely

restricts branch banks of converted associations to such as have a definite proportion of the capital of the parent bank assigned to them, and it is not to be assumed that the law contemplated that associations of primary organization should be permitted to assign any portion of their capital to and operate domestic branches.

This fact is further to be inferred from Section 5138, United States Revised Statutes, which prohibits the formation of associations with less capital than $200,000 in cities of population exceeding 50,000, and with less than a specified capital in places with population less than 50,000.

To permit the establishment of domestic branch banks would not only render possible an evasion of the provisions of section 5138, but tend to discourage the organization of banking associations which, in the absence of such branches, might be formed.

Section 5134 provides in part that the organization certificate of a national bank shall show "the place where its operations of discount and deposit are to be carried on," and section 5190 that "the usual business of each national banking association shall be transacted at an office or banking house (not offices or banking houses) located in the place (not places) specified in its organization certificate."

The words "place" and "at an office or banking house" have always been construed by the Comptroller to mean the legal domicile of the corporation, and this construction is sustained by the solicitor of the Treasury in an opinion rendered August 10, 1899, on the question of the right of a national bank to establish and maintain an auxiliary cash room at

some point distant from its banking house for the purpose of receiving deposits and paying checks. The solicitor says:

> "This section (5190, U. S. Rev. Stat.) contemplates that the usual business of a national banking association shall be transacted at one office or banking house, and as receiving deposits and paying checks belong to the 'usual business' of a bank, I am of the opinion that the statute does not authorize the establishment of an auxiliary cash room in a different part of the city for the purpose proposed. Besides, it may be observed that if a national banking association can lawfully establish and maintain a separate office for receiving deposits and paying checks, it could as well establish as many such auxiliary cash rooms in the city of its corporate residence as its business might require; and, indeed, the entire business of the bank might be parceled out and conducted in the same way all over the city."

The District Court of the United States, in the case of Armstrong v. Second National Bank of Springfield (38 Fed. Rep. 883), involving among other things the question of the right of a national bank to cash a check elsewhere than at its banking house, held that:

> "Under this section (5190) it certainly would not be competent for a national bank to provide for the cashing of checks upon it at any other place than at its office or banking house."

If, therefore, it is unlawful for a national bank to cash a check elsewhere than at its banking house, it is likewise unlawful for it to discount notes or to re-

ceive deposits elsewhere, for one is as much a part of the "usual business" of a bank as the other. As it is obviously impossible for a bank to transact its entire business within the four walls of any single building, it is not held that the law contemplates that the "entire business" as distinguished from its "usual business" shall be transacted in its banking house.

In the case of The Merchants National Bank of Boston v. The State National Bank (10 Wall. 604) it was held in this connection that:

> "The provision requiring the 'usual business' of the association to be transacted 'at an office or banking house specified in its organization certificate' must be construed reasonably, and a part of the legitimate business of the association which cannot be transacted at the banking house may be done elsewhere."

The question involved in this case was the right of the bank's officers to purchase gold elsewhere than at its banking house, and the Court held that:

> "The gold must necessarily have been bought, if at all, at the buying or selling bank or at some third locality. The power to pay was vital to the power to buy, and inseparable from it."

The "legitimate business" of a bank, therefore, which a reasonable construction of the law would permit to be done elsewhere than at its banking house would seem to be restricted to transactions similar in character to that involved in the decision quoted and not the ordinary and usual business of receiving deposits and cashing checks.

While the National Bank Act does not expressly prohibit the establishment and maintenance of domestic branch banks or agencies by associations of primary organization, the implication to that effect is clear, and the Attorney-General of the United States, in an opinion rendered on May 11, 1911 (before the passage of the Federal Reserve Act, authorizing the establishment of branches in foreign countries, dependencies or insular possessions of the United States), in the case of the Lowry National Bank of Atlanta, Ga., which desired to establish branch banks within the limits of that city, held that:

> "First. Independently of Section 5190, Revised Statutes, a national bank is not, under its charter, authorized to establish a branch or co-ordinate office for the purpose of carrying on a general banking business in the place designated in its certificate of organization; and
>
> Second. That Section 5190, Revised Statutes, properly construed, restricts the carrying on of the general banking business by a national bank to one office or banking house in the place designated in the association's certificate of organization."

That the act does not contemplate the operation of domestic branch banks by national banks of primary organization is evidenced by the fact that in 1892 a special act was approved authorizing the operation of a branch by a Chicago national bank on the World's Fair grounds. In 1901 similar legislation was enacted by Congress in connection with the Louisiana Purchase Exposition held in 1904.

APPENDIX C.

Opinion of the Supreme Court of Missouri in State ex rel. v. First National Bank in St. Louis, Delivered March 3, 1923.

This is an original proceeding in quo warranto to determine the authority of a national bank engaged in business in the City of St. Louis to establish and conduct a branch bank at another than its regular place of business in said city.

1. A national bank is an artificial legal entity, created to faciiltate the transaction of fiscal affairs under the authority of the laws of the United States. Like other corporations, it possesses such powers as are granted to it by the act of its creation, or, more comprehensively stated, which have been or may be conferred upon it by Congress within the limitations of the Federal Constitution. This reference as to the origin of its powers does not, as we shall subsequently show, prevent state legislation in regard thereto. Existing, as it necessarily does, by law, it possesses only such powers as are expressly granted or which may necessarily be implied for the effective discharge of its corporate functions. As to powers expressly granted, no difficulty need be encountered in defining their limitations. As to those incidental, it must appear, to authorize their exercise, that they are clearly within the scope and purview of the purpose for which the corporation was created. This rule is especially applicable when it is sought to invoke what are termed the powers of a corporation incident to it at common law; such ap-

plication being authorized only when it is apparent that the power invoked is a necessary incident to the proper exercise of the corporation's existence or functions (Kerens v. Trust Co., 283 Mo., l. c. 621; State ex inf. Missouri Ath. and St. L. Clubs, 261 Mo., l. c. 599; Millinery Co. v. Trust Co., 251 Mo., l. c. 575).

These rules are elementary in character to the extent that they may be termed hornbook law on this subject. They have been stated to emphasize their general application to all classes of corporations in the absence of statutes to the contrary.

While we have contented ourselves with the citation of cases in this behalf determined within our own jurisdiction, they assert a general doctrine which does not contravene the rulings of any Court, state or national, when rightly considered. To illustrate: In Bullard v. Bank, 18 Wall, l. c. 593, it was held that "the extent of the powers of national banking associations is to be measured by the act of Congress under which such associations are organized."

In Logan etc. Bank v. Townsend, 139 U. S., l. c. 73, it was announced with equal emphasis that "it is undoubtedly true, as contended by the defendant, that the National Bank Act is an enabling act for all associations organized under it, and that a national bank cannot rightfully exercise any powers except those expressly granted by that act, or such incidental powers as are necessary to carry on the business of banking for which it was established."

To a like effect are the following cases: Bowen v. Needles Nat. Bk., 94 Fed. 925; Commercial Nat. Bk. v. Pirel, 82 Fed. 799, 49 U. S. App. 596; Hanover

Nat. Bk. v. Burlingame Nat. Bk., 109 Fed. 421, 48 C. C. A. 482; Hyde v. Equit. Life Assur. Soc., 116 N. Y. Sup. 219; Ocmulgee Riv. Lum. Co. v. Ocmulgee Val. Ry. Co., 251 Fed. 161; State v. Am. Sugar Ref. Co., 138 La. 1005; Somerville Water Co. v. Somerville, 78 N. J. Eq. 199; Knapp v. Sup. Commandery, 121 Tenn. 212.

Guided by these rules, a reference to and a review of the laws creating national banks and defining their powers is of first consideration.

Persons desiring to form a national bank are required, among other things, under the Act of Congress of June 3, 1864, to file with the Comptroller of the Currency a statement of the place where its operations of discount and deposit are to be carried on, designating the state, territory or district, and the particular county, city, town or village (Subdiv. 2, Sec. 5134, p. 3455, 3 Comp. Stat. U. S.)

A subsequent section of the same act provides that the usual business of each national banking association shall be transacted at an office or banking house located in the place specified in its organization certificate (Sec. 5190, p. 3486, 3 Comp. Stat. U. S.)

No express power to establish a branch bank appears in either of these statutes. Section 5134, in requiring the certificate of organization to designate the county, city or town in which the bank is to be located, is intended for the information of the Comptroller in enabling him to intelligently determine whether the authority sought to be exercised should be granted. While the Banking Act is silent on the subject, a construction of same is not unreasonable which clothes the Comptroller with at least such dis-

cretion in the premises as will enable him to act intelligently or with a proper regard for the demands of business in approving or rejecting the articles of organization. Hence, a general designation of the proposed business location as provided in said section is all that is necessary.

The purpose of section 5190 is not for the information of the Comptroller, it being a matter with which he has no concern when he has granted the articles as to where the place of the business shall be located within the county, city or town. This is a matter to be determined by the board of directors in establishing the business. To render their act specific it must be confined to the terms of the statute, viz., to "an office or banking house within the county, city or town" named in the articles. This location having been established, it is within the contemplation of the statute that the power of the bank is to be there exercised. Otherwise the words "an office or banking house" cease to be specific, and instead of being singular in number may be construed as plural, and thus permit the establishment of banks in as many places within the county, city or town as the judgment of the directors may prompt. Such a construction finds no resting place in reason. If followed it would, instead of centralizing and rendering more stable the powers of a bank, enable it, by multiplying its places of business, to subdivide and at the same time extend its powers in such manner as to stifle competition. Such an effect was certainly never contemplated by the Banking Act.

II. We are more concerned, however, with an interpretation of the language of subdivision 7 of sec-

tion 5136, granting incidental powers, whether literally or liberally construed, than with the probable effect of its operation under the construction sought to be given to it by the respondent. If, as we have stated, the terms of section 5190 be unmistakable in limiting the location of the place of business, such location, so long as maintained, will, under the terms of the statute, exclude by implication the establishment of a branch bank, the business of which is to be conducted under the authority of the original articles of organization. However, it is contended that the power to establish branches is authorized under section 5136. The language of subdivision 7 of that section provides, among other things, that the board of directors of a bank may, subject to law, exercise all such incidental powers as shall be necessary to carry on the banking business. Several preliminary assumptions are necessary before substantial color can be given to this contention. First, section 5190 must be so construed as to authorize the transaction of a bank's business at offices or banking houses insead of at "an office or banking house"; second, the establishment of a branch bank must be held to be the exercise of an incidental power; third, such power, when exercised, must be within the law, and, fourth, it must be necessary to the transaction of the banking business.

The first assumption we have discussed with the result that the unmistakable character of the words employed and the purpose to be accomplished did not, in our opinion, authorize such an interpretation of the section as to enable its terms to be read in the plural as well as the singular number. The sec-

ond involves the question as to the meaning of incidental powers. The statute (subdivision 7, section 5136) employs the word "incidental," rather than the word "implied," in designating the power other than that expressly conferred on the board of directors. An incidental power, as we said in State ex inf. Harvey v. Missouri Ath. & St. L. Clubs (261 Mo., l. c. 599), is one directly and immediately appropriate to the execution of the powers expressly granted and exists only to enable the corporation to carry out the purpose of its creation (citing cases).

An implied power is one that may be inferred from that granted or, as the Supreme Court of Massachusetts has said (Grant v. Marshall, 138 Mass. 228), it is a grant or reservation by implication of law. In State ex inf. Harvey (supra), we defined an implied power more elaborately as one "possessed by a corporation not indispensably necessary to carry into effect others expressly granted and comprises all that is appropriate, convenient and suitable for that purpose, including as an incidental right a reasonable choice as to means to be employed in putting into practical effect a power of this character." Without chopping logic or refining distinctions as to these adjectival words, it will suffice to say that in statutes and judicial opinions they are frequently interchangeably used (3 Thomp. Corp. [2nd ed.], sec. 2105). This need not concern us, however, in the determination of respondent's contention, as the statute uses the word "incidental," and to this we will give attention.

What, therefore, are the powers of a national bank "directly or immediately appropriate to the execution

of the specific powers granted?" The provisions of subdivision 7, following the phrase conferring incidental powers upon the board of directors, furnish examples from which, by analogy, the scope of this character of powers may be determined. They include the discounting and negotiating of promissory notes, drafts, bills of exchange and other evidences of debt; the receiving of deposits; the buying and selling of exchange, coin and bullion; the loaning of money on personal security, and the obtaining, issuing and circulating of notes. While these powers are distinct and neither is a limitation upon either of the others, they cannot be otherwise held than as directly and immediately appropriate to the transaction of the banking business. Although they may not be such incidental powers as are given generally to all banking institutions, they are incidental to banks created under the National Bank Act (Seligman v. Charlottesville Nat. Bk., 3 Hughes 647, 21 Fed. Cas. No. 12642). While a national bank may lawfully do many things in securing and collecting its loans in the enforcement of its rights and the conservation of property previously acquired, the exercise of such powers is incidental in being necessary for the purpose of carrying into effect the powers expressly granted (Morris v. Springfield Third Nat. Bk., 142 Fed. 25, 73 C. C. A. 211; Cooper v. Hill, 94 Fed. 582, 36 C. C. A. 402). The cases cited are illustrative of the limitations upon the latitude given national banks, not in the character of acts they may primarily engage in as a business, but in the management and protection of property and property rights acquired in the usual banking transactions, including such minor incidental powers in addition as may be adapted to the ends in view.

In addition to those cited the trend of the cases defining the incidental powers of national banks is in harmony with the foregoing conclusion.

The apparent purpose for the establishment of branch banks is to multiply the places of business of the principal bank and thereby increase the volume of same. As a manifestation of commercial progress, the effort may well be commended. That phase of the matter, however, is not under consideration. It is a question of power and not progress that demands solution. Certainly it is in no sense essential to the exercise of any of the powers granted nor is it a necessary incident to the carrying on of the banking business within the meaning of the statute.

The third limitation necessary to be observed before an incidental power can be invoked by a national bank, is that it must be "within the law." The law referred to is the National Bank Act to which banks organized thereunder owe their existence and within the scope and purview of which they must exercise their functions. The sections of the act reviewed lend no countenance to the contention that the establishment of branch banks is within the scope and purview of these sections and hence not within the law.

The fourth and last limitation upon the exercise of incidental power by a board of directors required by subdivision 7 is that such power shall be necessary "to carry on the business of banking." In a review of the other conditions necessary to the exercise of power referred to, we have held that the carrying on of the banking business did not require the establishment of branch banks and hence that it was not within the terms of the statute.

III. An unambiguous statute, such as the National Bank Act, does not require the adventitious aid of subsequent kindred legislation to determine its meaning. Despite this fact where, as here, there is a general grant of power, however clear that grant may be, the enactment of subsequent legislation containing a specific kindred grant of power will afford at least persuasive support to the conclusion that the latter was not included within the former or the original grant. Such is the effect of the Act of Congress of March 3, 1865, now Sec. 5155, 3 U. S. Comp. Stats., p. 3467. This act provides that any bank or banking institution organized under a state law and having branches may, in conformity with existing law, become a national bank and retain its branches. In the passage of this act it is evident that the legislative construction of the original is that it did not authorize the establishment of branch banks. Otherwise the subsequent section 5155 would not have been enacted. A recognition of the limitations of the National Bank Act is evident from the fact that the right of a national bank to have branches as provided in said section is limited to states the banking laws of which authorize the establishment of branches.

The establishment by special acts of Congress of a branch bank at Chicago during the Columbian Exposition and at St. Louis during the Louisiana Purchase Exposition affords further evidence of legislative construction of the National Bank Act, which excludes from its incidental powers the right to establish branch banks.

In addition, it is a well-established rule of construction that a long-continued interpretation of a

statute by public officers charged with its execution, while not controlling upon the courts, is entitled to special consideration (McAllister v. Cupples Station, 283 Mo. 115; State ex rel. Chick v. Davis, 273 Mo. 660; State ex rel. Kin. Tel. Co. v. Roach, 269 Mo. 437; Ewing v. Vernon Co., 216 Mo., l. c. 689).

Apropos of the foregoing, it is shown that the attorneys general of the United States have uniformly construed the National Bank Act as not authorizing the establishment of branch banks.

IV. Enough has been said to demonstrate the fact that neither by express terms nor reasonable implication can it be held that national banks are authorized to establish branches in states which have not granted that authority to banking corporations doing business therein. This being true, it remains to be determined whether the processes of the state can be invoked to prevent the exercise of power by a national bank shown to be ultra vires under the law of its creation. That national banks are corporate entities which owe their existence to federal law alone and as such are subject to the paramount authority of the United States, there can be no question. Equally as well established is the fact that a state cannot through its legislative department define the duties of national banks or control their affairs whenever such attempted exercise of authority expressly conflicts with the law of the United States (Davis v. Elmire Savings Bk., 161 U. S. 275; McClellan v. Shipman, 164 U. S. 356).

The information filed herein by the Attorney-General does not involve the commission of an act in conflict with the laws of the United States, nor does

it tend to impair the efficiency of any agency of the National Government. It cannot, therefore, be said to be in conflict with the rule above announced and hence does not violate it.

This conclusion finds ample support in a review of the National Bank Act alone; but if further reasons therefor are deemed necessary they may be found in an illuminating discussion by the Supreme Court of Kentucky (First Nat. Bk. v. Comm., 143 Ky. 816, 34 L. R. A. [n. s.] 54) defining the limits that may be placed upon the federal control of national banks, or conversely the extent to which the state may exercise control over them. The state court ruled in the affirmative on this question. The objection was made that the bank was an agency of the Federal Government for which Congress had provided a complete system of control and regulation, and that the state could not in any manner interfere with its affairs, and that state laws applicable to banks incorporated within the state were inoperative as to national banks. The Court held, in effect, that while a state cannot either by its constitution or legislation directly or indirectly regulate or control the organization or conduct of a national bank so as to interfere with the business for which it was created, the laws of the state applicable to banks and other corporations organized therein may be invoked against a national bank when it attempts to exercise rights or do things outside the scope of the business it was created to conduct and which is not essential to its existence or efficiency; that when a national bank exceeds the purpose of its creation and goes beyond the scope of its functions the state may deal with such of its

transactions as are in excess of the authority conferred upon it by Congress and in violation of the laws of the state in the same manner as it would deal with the business or property of any other banking corporation.

The rule as thus announced is supported by the holding of the United States Supreme Court in the Davis case, supra, in which, after declaring the paramount authority of the federal law over national banks, it was said, that "Nothing in this opinion is intended to deny the operation of general and undiscriminating state laws on the control of national banks so long as such laws do not conflict with the letter or the objects and purposes of Congressional legislation."

A further ruling to like effect by the United States Supreme Court is found in the McClellan case, supra. In that case an insolvent debtor conveyed real estate to a national bank, thereby giving it a preference. This act was assailed by the other creditors as in violation of a state statute. The bank resisted the right of the creditors as thus asserted, upon the ground that national banks, under the federal laws, were authorized to take deeds to real estate to secure pre-existing debts, and that the Massachusetts statute was in conflict with the act of Congress, and, hence, inoperative. The Supreme Court held that the state law was not in conflict with the act of Congress, and that the other creditors had a right to share in the property conveyed to the bank. The exhaustive manner in which the question was considered is shown in the following excerpt from the opinion:

> " 'National banks are subject to the laws of the state and are governed in their daily course of

business far more by the laws of the state than of the nation. All their contracts are governed and construed by state laws. Their acquisition and transfer of property, their right to collect their debts, and their liability to be sued for debts, are all based on state law. It is only when the state law incapacitates the banks from discharging their duties to the government that it becomes unconstitutional.' * * * Nor is there anything in the statutes of the State of Massachusetts here considered which in any way impairs the efficiency of national banks or frustrates the purpose for which they were created. No function of such banks is destroyed or hampered by allowing the banks to exercise the power to take real estate, provided only they do so under the same conditions and restrictions to which all the other citizens of the state are subjected, one of which limitations arises from the provisions of the state law which, in case of insolvency, seeks to forbid preferences between creditors. Of course, in the broadest sense, any limitation by a state on the making of contracts is a restraint upon the power of a national bank within the state to make such contracts; but the question which we determine is whether it is such a regulation as violates the act of Congress. As well might it be contended that any contract made by a national bank within a state, in violation of the state laws on the subject of minority or coverture, was valid because state laws were in conflict with the act of Congress, or impaired the power of the bank to perform its functions."

V. In this state the banking business can be conducted only by a corporation. Thus organized, the extent of its powers must, as we have said, be deter-

mined by the statute of its creation. The State Banking Act gives express recognition to this rule in providing that banks, whether incorporated under federal or state law, can transact only such business as is permitted by the law of the United States or of the state (Sec. 11684, R. S. 1919). Branch banks not having been permitted by the state law, either by express terms or necessary implication, the well-recognized canon of construction will authorize the exclusion of this power from those granted. Reliance upon this rule is, however, unnecessary in the presence of a subsequent section (Sec. 11737, R. S. 1919), in which it is provided "that no bank shall maintain in this state a branch bank or receive deposits or pay checks except its own banking house." The attempt, therefore, of the respondent to establish a branch bank is not only an act in excess of its corporate powers but in violation of an express statute.

The writ of quo warranto invoked by the relator is a recognized right and an appropriate remedy under the circumstances (State ex inf. Attorney-General v. Standard Oil Co., 218 Mo. 1). Upon an appeal to the Supreme Court of the United States in the Standard Oil case that Court held (224 U. S. 270) that the proceeding by quo warranto which had been instituted in the State Supreme Court in that case by the Attorney-General was authorized. Discussing the powers of the Missouri Supreme Court in the premises it was held that "its decision and judgment necessarily imply that under that clause of the Constitution it had jurisdiction of the subject matter and authority to enter judgment of ouster and fine in civil quo warranto proceedings. That ruling is con-

clusive upon us, regardless of whether the judgment is civil or criminal, or both combined."

VI. The right of the Attorney-General to institute this action having been established, the question arises, although it does not seem to be seriously contested, as to the tribunal in which it should be brought.

The 16th subdivision of section 24 of the National Judicial Code provides, among other things, that the United States District Courts have original jurisdiction "of all cases commenced by the United States, or by direction of any officer thereof, against any national banking association, and cases for winding up the affairs of any such bank; and of all suits brought by any banking association established in the district for which the court is held, under the provisions of title 'National Banks,' Revised Statutes, to enjoin the Comptroller of the Currency, or any receiver acting under his direction, as provided by said title. And all national banking associations established under the laws of the United States shall, for the purposes of all other actions by or against them, real, personal or mixed, and all suits in equity, be deemed citizens of the state in which they are respectively located."

The United States statutes further provide that national banks shall have power "to sue and be sued, complain and defend, in any court of law and equity, as fully as natural persons" (U. S. R. S., Sec. 5136; U. S. Comp. Stats. 1916, Sec. 9661).

Under Section 5198 (3 Comp. Stat., p. 3493, 6 Fed. Stat. Ann., p. 928), prescribing where suits may be brought against national banks, it is provided "that

suits, actions and proceedings against any association under this title may be had in any circuit, district or territorial court of the United States held within the district in which such association may be established, or in any state, county or municipal court in the county or city in which said association is located, having jurisdiction in similar cases."

Under the proviso of an act of Congress approved July 12, 1882 (U. S. Comp. Stat. 1916, Sec. 9668), it is further provided "that the jurisdiction for suits hereafter brought by or against any association established under any law providing for national banking associations, except suits between them and the United States, or its officers and agents, shall be the same as, and not other than, the jurisdiction for suits by or against banks not organized under any law of the United States which do or might do banking business where such national banking association may be doing business when such suit may be begun; and all laws and parts of laws of the United States inconsistent with this proviso be, and the same are hereby, repealed."

From the foregoing, it will be seen that, as this case does not fall within the inhibitions of the federal statutes quoted, jurisdiction of same may be entertained by this Court.

In Hermann v. Edwards (238 U. S. 137), the United States Supreme Court construed subdivision 16 of Sec. 24 of the National Code and held, as it must have held within the unmistakable meaning of said subdivision, that state courts were clothed with jurisdiction to hear and determine all cases against national banks except those exempted under said sub-

division. The case at bar does not fall within those exemptions.

This is not a proceeding to deprive the respondent of any right or limit the exercise of any power conferred upon it by the laws of the United States, but to prevent it from committing an act in violation, under the established rules of construction, of the laws of its creation and expressly contravening a state statute.

The character of a judgment in quo warranto cases is largely within the discretion of the Court and foreign corporations may, under numerous precedents, be prohibited by a general ouster from committing particular illegal acts (State ex inf. Attorney-General v. Standard Oil Co., 218 Mo. 1; State ex inf. Attorney-General v. Standard Oil Co., 194 Mo., l. c. 149; State ex inf. Attorney-General v. Armour Packing Co., 173 Mo., l. c. 366; State ex inf. Attorney-General v. Firemen's F. F. Ins. Co., 152 Mo. 1; State ex inf. Attorney-General v. Arkansas Lumber Co., 190 S. W. [Mo.] 894).

In view of all of the foregoing, judgment of ouster as prayed in the pleadings is hereby ordered. All concur except Ragland, J., not sitting.

R. F. Walker, J.